TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 65

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION, PETITIONER,

vs.

ARMOUR & COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 6, 1940.

CERTIORARI GRANTED JUNE 3, 1940.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 19, 1940.

—7546

[fol. a] [File endorsement omitted]

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

OCTOBER TERM, A. D. 1939

No. — Original

In the Matter of the Application of ARMOUR & COMPANY, an Illinois Corporation, for a Writ of Mandamus against the Honorable Frank L. Kloeb, Judge of the District Court of the United States for the Northern District of Ohio, Western Division, and Against said District Court

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS—Filed July 7, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now comes the petitioner, Armour & Company, an Illinois corporation, and moves the court for leave to file the petition for writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing the Honorable Frank L. Kloeb, Judge of the District Court of the United States, for the Northern District of Ohio, Western Division, and also directing the said District Court to show cause why a writ of mandamus should not issue against them and each of them in accordance with the prayer of said petition, and why your petitioner should not have such relief and such other and further relief in the premises [fol. 2] as may be just and proper.

Welles, Kelsey, Cobourn & Harrington, Edward W. Kelsey, Jr., Fred A. Smith, Attorneys for Petitioner.

[fol. 2a] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Title omitted]

PETITION OF ARMOUR & COMPANY FOR WRIT OF MANDAMUS—Filed July 7, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The petition of Armour & Company respectfully shows:

1. That at all times hereinafter mentioned prior to May 28, 1938, petitioner was a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and maintained an office and place of business in the City of Toledo, Lucas County, Ohio, engaging in the business of selling at wholesale fresh meat and meat products. As of May 28, 1938, said Kentucky corporation was liquidated and its assets transferred to its sole stockholder, Armour & Com-[fol. 2b] pany, an Illinois corporation, which assumed the debts and obligations of said Kentucky corporation, and which has continued to maintain said office and place of business and to engage in the business of selling at wholesale fresh meat and meat products.

2. On February 1, 1935, an action was begun in the Common Pleas Court of Lucas County, Ohio, by George E. Kniess, a resident of Toledo, Lucas County, Ohio, as plaintiff, against petitioner and Charles J. Burmeister, a citizen and resident of Toledo, Lucas County, Ohio, as defendants, by filing a petition therein praying judgment in the amount of $100,000.00, said cause being Cause No. 141981 on the Docket of said Court of Common Pleas.

On February 6, 1935, separate actions were begun by Marie Kniess, a resident of the City of Toledo, Lucas County, Ohio, and Louisa F. Meinecke, a resident of the City of Toledo, Lucas County, Ohio, as plaintiffs against petitioner and Charles J. Burmeister as defendants, by filing their respective petitions therein praying judgment in each case in the amount of Fifty Thousand Dollars ($50,-000.00) said causes being Causes Nos. 142031 and 142032 on the docket of said Court of Common Pleas.

On March 2, 1935, separate actions were begun by Herbert O. Schwalbe, a resident of the City of Toledo, Lucas County, Ohio, and Maybelle Schwalbe, a resident of the City

[fol. 3] of Toledo, Lucas County, Ohio, as plaintiffs against petitioner and Charles J. Burmeister as defendants, by filing their respective petitions therein praying judgment in the amounts of Ten Thousand Dollars ($10,000.00) and One Hundred Thousand Dollars ($100,000.00), respectively, said causes being Causes Nos. 142359 and 142360 on the docket of said Court of Common Pleas.

The petitions in each of the above five mentioned cases are in all material respects identical. A copy of the petition in the George E. Kniess case is attached hereto, marked "Exhibit A" and made a part hereof.

3. Within the time allowed by law, your petitioner filed in said Court of Common Pleas in each of the causes referred to an identical (a) petition for removal to the District Court of the United States, (b) notice of filing the same, (c) bond on removal, and (d) motion for removal. Copies of such pleadings in the George E. Kniess case are attached hereto, marked "Exhibits B, B-1, B-2 and B-3" and made a part hereof.

4. Thereafter, the plaintiff in each of the causes referred to, requested and received a hearing in the Common Pleas Court of Lucas County, Ohio, on the petition for removal, and in each case the Common Pleas Court of Lucas [fol. 4] County, Ohio, denied said petition for removal and signed identical Journal Entries in all the cases. A copy of such Journal Entry in the George E. Kniess case is attached hereto, marked "Exhibit C" and made a part hereof.

5. On the 10th day of March, 1936, petitioner filed in each of the aforementioned causes an identical motion to reconsider the petition for removal. A copy of said motion in the George E. Kniess case is attached hereto, marked "Exhibit D" and made a part hereof.

6. On March 14, 1936, said Common Pleas Court of Lucas County, Ohio, denied said motion to reconsider the petition for removal in each cause, and an identical Journal Entry was filed in each cause. A copy of said Journal Entry in the George E. Kniess case is attached hereto, marked "Exhibit E" and made a part hereof.

7. Thereafter, the George E. Kniess case proceeded to trial, and the other four cases were by agreement of counsel

permitted to remain pending without any further action until disposition of the George E. Kniess case.

8. On November 30, 1938, the Supreme Court of Ohio rendered its decision in the George E. Kniess case (reported in 134 O. S. 432), the Court holding in the syllabi:

[fol. 5] "Where a citizen of Ohio and a citizen of another state are joined as defendants, the cause should be removed to the federal courts when a separable controversy exists between the resident plaintiff and the non-resident defendant.

"In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tort-feasors. (Canton Provision Co. v. Gauder, 130 Ohio St., 43, approved and followed.)"

In the course of the opinion, the Supreme Court concluded:

"As the allegations of the petition stand it can hardly be said that the liability of Armour & Company would be the same when the pork was sold in metwurst as it would be if Burmeister had sold the Boston butts over the counter in the same form as he received them from Armour & Company. In either instance, however, the liability of Armour & Company was primary and that of Burmeister secondary. There was no privity of contract between Kniess and Armour & Company as there was between Kniess and Burmeister. Differing in degree, and differing in nature, the liability of Armour & Company and Burmeister cannot be joint. Their alleged torts were different in character and kind, and were not concurrent. Morris v. Woodburn, 57 Ohio St., 330, 48 N. E., 1097; Village of Mineral City v. Gilbow, 81 Ohio St., 263, 90 N. E. 800.

"For the reasons stated we are constrained to hold that a separable controversy did exist between the plaintiff [fol. 6] Kniess, and Armour & Company. The defendant, Armour & Company, adequately preserved its exceptions to the ruling of the court denying the petition for removal. * * * For the reasons stated the trial court erred, and the cause is therefore reversed and remanded to the Court of Common Pleas with instructions to grant the petition of

Armour & Company to remove the cause to the District Court of the United States." (Pages 444, 445.)

9. Thereafter, the said George E. Kniess filed in the Supreme Court of Ohio an application for a rehearing, which application was, on January 25, 1939, denied. On January 26, 1939, the mandate from the Supreme Court of Ohio was returned to the Court of Common Pleas of Lucas County, Ohio, in the said George E. Kniess case. A copy of said mandate is attached hereto, marked "Exhibit F" and made a part hereof. Said mandate provides in part:

"This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and this cause is hereby remanded to said Court of Common Pleas of Lucas County, Ohio, with instructions to grant the petition to remove the cause to the District Court of the United States."

[fol. 7] 10. On February 10, 1939, pursuant to the mandate of the Supreme Court, the Common Pleas Court of Lucas County, Ohio, set aside the prior order denying the petition and order for removal and set aside the prior order denying the motion to reconsider said petition for removal and ordered the George E. Kniess cause removed to the District Court of the United States for the Northern District of Ohio, Western Division. A similar journal entry was entered on February 10, 1939 in each of the other four causes. The journal entries in the George E. Kniess case and the Marie Kniess case are attached hereto, marked "Exhibits G and G-1", and made a part hereof.

11. Pursuant to said orders, a transcript of the record in each case, certified as required by law, was filed on February 17, 1939, in the District Court of the United States for the Northern District of Ohio, Western Division. Said transcripts of the records included all the pleadings, papers and journal entries heretofore referred to and made a part

of this petition as exhibits. The George E. Kniess case was docketed by the District Court as Civil Action No. 4338, Louisa F. Meinecke case as Civil Action No. 4339, Marie Kniess case as Civil Action No. 4340, Herbert Schwalbe case as Civil Action No. 4341 and Maybelle Schwalbe case as Civil Action No. 4342.

[fol. 8] 12. On February 20, 1939, pursuant to the Federal Rules of Civil Procedure, petitioner filed in each of said causes in the District Court of the United States, an identical separate answer.

13. On the 22nd day of February, 1939, an identical stipulation was filed in each case in said District Court permitting the plaintiffs to file an amended complaint without prejudice to the rights of the defendants to move to strike any new matter, said stipulations further providing that the defendants' answers should stand as answers to the amended complaint. A copy of said stipulation in the George E. Kniess case is attached hereto, marked "Exhibit H", and made a part hereof.

14. On the 22nd day of February, 1939, the plaintiff in each of said causes filed an amended complaint in the District Court, said complaints being in all material respects identical. On March 1, 1939, defendant, Charles J. Burmeister, filed an identical answer in each case.

15. On the 3rd day of March, 1939, the plaintiff in the George E. Kniess cause filed a motion to remand said cause, together with two affidavits in support thereof, which motion and affidavits in support thereof are attached hereto, marked "Exhibits J, J-1 and J-2", respectively, and made a part hereof.

[fol. 9] 16. On the 6th day of March, 1939, the plaintiff in each case, except the George E. Kniess case, filed an identical motion to remand said cause, together with an affidavit in support thereof. A copy of said motion to remand and affidavit in support thereof in the Marie Kniess case are attached hereto, marked "Exhibits K and K-1", respectively, and made a part hereof.

17. On the 16th day of March, 1939, petitioner filed in said District Court in the George E. Kniess cause a motion, pursuant to Judicial Code Section 274 (28 U. S. C. A., Section 399), to amend Armour & Company's petition for removal

to correctly state the facts in the event it was ascertained that George E. Kniess was a citizen and subject of Germany as he claimed in his motion to remand.

18. On April 1, 1939, the Honorable Frank L. Kloeb, as Judge of the United States District Court for the Northern District of Ohio, Western Division, and said Court entered an identical order in each case sustaining the motion to remand. A copy of said order of remand in the George E. Kniess case is attached hereto, marked "Exhibit L", and made a part hereof. Said Judge and said Court did not render any opinion on the motion to remand.

19. On April 22, 1939, petitioner filed in each of said cases in said District Court, a motion to vacate and set aside said order of remand. A copy of said motion in the George E. Kniess case is attached hereto, marked "Exhibit M", [fol. 10] and made a part hereof. On June 22, 1939, said District Court, without rendering any opinion, overruled said motions to vacate and set aside said orders of remand.

20. In the opinion of your petitioner's counsel, the orders of the District Court in each cause necessarily hold that a separable controversy was not presented and purport to exercise jurisdiction that said judge and said court do not possess, i. e., a jurisdiction to review and reverse the decision and order of the Supreme Court of Ohio and the orders of the Court of Common Pleas of Lucas County, Ohio, which decision and orders are conclusive on all courts, including said United States District Court, subject to such review by appeal or error as may exist in the Appellate Courts of Ohio and the Supreme Court of the United States.

21. In the opinion of your petitioner's counsel, the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, have full and complete jurisdiction to determine whether or not the plaintiff's petition in these causes stated a joint cause of action against your petitioner and Charles J. Burmeister, the other defendant, and that question is determined exclusively by the laws of Ohio on that subject as construed by the courts of Ohio.

22. In the opinion of your petitioner's counsel, the plaintiff, George E. Kniess, sought, and after a full hearing, secured, the opinion and decision of the Supreme Court of Ohio, and the plaintiffs in each of the other four cases

[fol. 11] sought, and after a full hearing, secured, the opinion and decision of the Court of Common Pleas of Lucas County, Ohio, on that precise question, and said decisions are, as between the parties to each of said causes, res adjudicata and final.

23. In the opinion of your petitioner's counsel, the United States District Court for the Northern District of Ohio, Western Division, and the Honorable Frank L. Kloeb, as Judge of the said Court, are required by 28 U. S. C. A. 687 (R. S. 905) to give full faith and credit to the final orders and decisions in these causes entered, after full hearings accorded all parties in interest, by the Supreme Court of Ohio and by the Court of Common Pleas of Lucas County, Ohio.

24. In the opinion of your petitioner's counsel, said motions to remand did not, and could not, present any question for determination by the said Honorable Frank L. Kloeb or the said District Court that had not theretofore been presented to and finally and conclusively determined by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio.

25. In the opinion of your petitioner's counsel, the United States District Court for the Northern District of Ohio, Western Division, and the Honorable Frank L. Kloeb, as Judge of said Court, has jurisdiction of the subject matter, according to the laws of the United States, and juris-[fol. 12] diction of the parties by their appearance and pleading in said causes, and the Court cannot decline to consider the cases on their merits and divest itself of jurisdiction thereof by the Order to Remand.

26. In the opinion of your petitioner's counsel, said order of remand in the George E. Kniess case further denies to your petitioner the right to amend the petition for removal as requested in the petitioner's motion therefor, pursuant to Judicial Code Section 274c (March 3, 1915, c. 90, 38 Stat. 956; 28 U. S. C. A. 399).

27. In the opinion of your petitioner's counsel, the amended complaint filed by the plaintiff in each cause (as set forth more fully in Paragraph 14 hereof) and the stipulation filed in each cause (as set forth more fully in Paragraph 13 hereof) waived any defects in the removal pro-

ceedings, which defects, if in fact they exist, were but formal and modal, and the filing of said amended petition and said stipulation was a submission to the Federal jurisdiction and a consent to the removal proceedings, for which reason plaintiff in each cause was estopped to question the jurisdiction of the United States District Court.

28. In the opinion of your petitioner's counsel, said Judge and said Court in remanding said causes have transcended the jurisdiction of said court and undertaken the exercise of powers not vested in him or his court by any law of the United States.

[fol. 13] 29. In view of the fact that the District Court has entered orders in these causes in complete disregard of the prior adjudication of the same question by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, and for the other reasons heretofore stated, there is involved, in the opinion of your petitioner's counsel a question of public importance, which question is of such a nature that it is peculiarly appropriate that action be taken by this court.

30. In the opinion of your petitioner's counsel, a writ of mandamus should issue from this court in order to expedite the settlement of the important question involved, and, incidentally, in furtherance of the general policy of a prompt trial and disposition (28 U. S. C. A. 71, 80; Federal Rules of Civil Procedure, Rule 81(c)) of causes removed from the state courts to the courts of the United States.

Wherefore, your petitioner, being without remedy other than that sought herein, prays that a rule be made and issued from this Honorable Court directed to the said Honorable Frank L. Kloeb, Judge of the United States District Court for the Northern District of Ohio, Western Division, and to said United States District Court for the Northern District of Ohio, Western Division, to show cause why a writ of mandamus should not issue commanding the [fol. 14] said Judge and said Court, and each of them, to grant petitioner's motion to set aside and vacate the said order of remand in each of the said causes, and to grant the petitioner's motion to amend the petition for removal in the George E. Kniess cause and to continue to proceed in

all of said causes, and why your petitioner should not have such other and further relief in the premises as may be just and proper.

Welles, Kelsey, Cobourn, & Harrington, Edward W. Kelsey, Jr., Fred A. Smith, Attorneys for Petitioner.

[fol. 15] EXHIBIT "A"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio, Plaintiff,

vs.

ARMOUR & COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

PETITION—Filed February 1, 1935

Defendant Armour & Company, Toledo, Ohio, is a corporation, having an office and place of business in the City of Toledo, Lucas County, Ohio, and is engaged in the business of slaughtering swine and other animals, and selling and offering for sale at wholesale the meat from the carcasses of such animals so slaughtered for food for human consumption.

Defendant Charles J. Burmeister owns and operates a grocery and meat store in the City of Toledo, Lucas County, Ohio, for the sale at retail of foods and food products for human consumption.

On or about the month of October, 1934, the exact date being unknown to plaintiff, defendant Armour & Company offered for sale in said City of Toledo, as being wholesome, untainted, without disease and in all respects fit for human food, certain articles of food known in the meat trade as Boston butts, the same being the shoulders of swine, or a part thereof, and said defendant sold at wholesale certain

[fol. 16] of said Boston butts as and for human food purposes to defendant Charles J. Burmeister.

Said Burmeister thereupon ground or chopped the meat of said Boston butts into small particles and mixed the same with certain condiments, the precise nature of which is unknown to plaintiff, but which were not pork or meat products, and thereby made the same into a kind or form of sausage known as metwurst. Said Burmeister then caused said mixture to be smoked or cured by placing and keeping the same in the smoke of smoldering hickory logs or chips for about a week. About October 20, 1934, he offered the same for sale at his aforesaid store, as a food product ready for human consumption without cooking or further treatment.

On or about said 20th day of October, 1934, plaintiff purchased a portion of said metwurst from said Burmeister, and ate of the same.

Plaintiff further says that each of said defendants was negligent in that said Boston butts so offered for sale and sold by each of said defendants in the manner aforesaid, and of which plaintiff partook as aforesaid, were not wholesome food or provisions for human consumption, but that said Boston butts, and thereby the metwurst made of the same, were adulterated, diseased, and infected in that the same then and there contained and were infected with parasites known as trichinae, by reason whereof the said Boston butts and the metwurst made of the same were wholly unfit, unsuitable and dangerous for consumption by plaintiff or any other person; contrary to the laws of the State of Ohio. [fol. 17] Said trichinae or parasites infect only swine, and such infection occurs solely in such swine through their eating matter containing such parasites, which said parasites thereafter lodge in the flesh of the swine before the animal is slaughtered.

Solely by reason of his having partaken of said metwurst, the meat part of which was so infected with said parasites, plaintiff contracted the disease known as trichinosis, through such parasites having entered his body in said food and there propagated, multiplied and increased.

Plaintiff further says that said disease is permanent and incurable; that no method is known to science at this time of eradicating and destroying said parasites in his body;

that they have lodged in his arms, shoulders and body, particularly the muscular tissues and parts thereof, and have attacked his eyes; that his sight is permanently impaired; that he has become debilitated and suffers, and will continue to suffer, great pain and anguish; that he is now compelled to take medical treatment, and will be obliged to continue such treatment for the rest of his life in order to check so far as may be the ravages of said disease; that his health is permanently impaired and injured and his life in constant danger.

Before being stricken with said disease plaintiff was in good health, was of the age of thirty years, and was able to and did earn approximately the sum of $47.50 per week, but that now his ability to work and earn money has been permanently impaired and diminished.

[fol. 18] And plaintiff says that by reason of the aforesaid acts and conduct of said defendants he has been damaged in the sum of One Hundred Thousand Dollars ($100,000.00).

Wherefore plaintiff asks judgment against said defendants in said sum of One Hundred Thousand Dollars ($100,000.00) and for his costs herein expended.

(Signed) Boggs & Chase, and Percy R. Taylor, Attorneys for Plaintiff.

Duly sworn to by George E. Kniess. Jurat omitted in printing.

PRAECIPE

141981

To the Clerk:

Please issue summons for the defendants in the above entitled cause directed to the Sheriff of Lucas County, Ohio, returnable according to law. Endorse thereon "Action for money, amount claimed $100,000.00."

(Signed) Boggs & Chase and Percy R. Taylor, Attorneys for Plaintiff.

[fol. 19] EXHIBIT "B"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio,
Plaintiff,

vs.

ARMOUR & COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES—Filed March 1, 1935

Your Petitioner, Armour and Company, says that it is one of the defendants in the above entitled action, which said action was begun in the Court of Common Pleas on the 1st day of February, 1935, and that the time for defendant to plead, answer or demur in said suit has not yet expired under the laws of the State of Ohio; that said suit is one of a civil nature at common law, of which the District Courts of the United States have original jurisdiction; that the matter in dispute exceeds the sum of Five Thousand and no/100 Dollars ($5,000.00), exclusive of interest and costs; that this case does not arise under an act of the United States of America entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees" in certain cases approved April 22, 1908, or any amendment thereto.

Your Petitioner, Armour and Company, respectfully shows that the plaintiff was at the time of the commencement of said suit, ever since has been and now is a citizen of the State of Ohio and a resident and citizen of the City of [fol. 20] Toledo, Lucas County, State of Ohio; that the defendant, Charles J. Burmeister, was at the time of the commencement of this suit, ever since has been and now is a citizen of the State of Ohio and a resident and citizen of the City of Toledo, Lucas County, State of Ohio; that the defendant Armour and Company, was at the time of the commencement of this suit, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that the plaintiff seeks to recover damages against Armour and Company for

claimed injuries to person due to an alleged unwholesome condition of certain meat sold by Armour and Company to Charles J. Burmeister and eaten by plaintiff.

Your Petitioner, Armour and Company, herewith files a good and sufficient bond under the statutes in such cases made and provided, conditioned as the law directs that it will, within thirty (30) days from the filing of the petition for removal, file a certified copy of the record of this cause in the District Court of the United States for the Northern District of Ohio, Western Division, and for the payment of all costs which may be added by said Court if the said District Court shall determine that this suit is improperly and wrongfully removed thereto.

Your Petitioner, Armour and Company, therefore prays that this cause proceed no farther herewith, except to order a removal of said cause to said District Court of the United States and to accept the bond herewith presented, and direct the Clerk of this Court to provide a certified transcript of [fol. 21] the record of this cause as required by law.

Tracy, Chapman and Welles, Attorneys for the Defendant, Armour and Company.

Duly sworn to by Edward W. Kelsey, Jr. Jurat omitted in printing.

[fol. 22] EXHIBIT "B-1"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio, Plaintiff,

vs.

ARMOUR & COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

NOTICE—Filed March 1, 1935

To Boggs & Chase and Percy R. Taylor, Attorneys for Plaintiff:

Please take notice that on the 1st day of March, 1935, the defendant, Armour & Company, will file in this cause a petition for removal to the District Court of the United

States for the Northern District of Ohio, Western Division, copy of which petition, motion and bond are attached hereto.

Said motion will be submitted to the Court on March 2, [fol. 23] 1935, or as soon thereafter as the Court may hear same.

(S.) Tracy, Chapman & Welles, Attorneys for Defendant, Armour and Company.

March 1, 1935.

This will acknowledge receipt of copy of the within notice and pleadings therein referred to.

(S.) Boggs, Chase & Percy R. Taylor, Attorneys for Plaintiff.

[fol. 24] EXHIBIT "B-2"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio, Plaintiff,

vs.

ARMOUR & COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

BOND ON REMOVAL—Filed March 1, 1935

Know All Men by These Presents: That,

We, Armour & Company, as principal, and Maryland Casualty Company as surety, are held and firmly bound unto George E. Kniess, plaintiff in the above entitled cause, his successors and assigns, in the sum of Five Hundred Dollars ($500.00) lawful money of the United States of America, for the payment of which well and truthfully to be made, we, and each of us, bind ourselves, and each of us, our successors and assigns, jointly and severally by these presents.

The conditions of this obligation are such that:

[fol. 25] Whereas, Armour & Company, has applied by petition to the Common Pleas Court, Lucas County, State

of Ohio, for the removal of a certain cause therein pending, wherein George E. Kniess is plaintiff and the said Armour & Company is defendant, to the District Court of the United States for the Northern District of Ohio, Western Division, for further proceedings on grounds in the said petition set forth, and that all further proceedings in said cause in said Court of Common Pleas be stayed.

Now, Therefore, if your petitioner, the said Armour and Company shall enter in said District Court of the United States for the Northern District of Ohio, Western Division, aforesaid, within thirty days from the filing of said petition a certified copy of the record of such suit and shall pay or cause to be paid all costs that may be taxed therein by said District Court of the United States for the Northern District of Ohio, Western Division, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

Armour & Company, by (S.) R. E. Peossall, Principal; by (S.) N. H. Schnieder, Surety.

[fol. 26] EXHIBIT "B-3"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio, Plaintiff,

vs.

ARMOUR AND COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

MOTION—Filed March 1st, 1935

Now comes the defendant, Armour and Company, and moves the Court for an order removing this cause to the District Court of the United States for the Northern District of Ohio, Western Division, in accordance with the Petition for Removal filed herein.

(S.) Welles, Kelsey and Cobourn, Attorneys for Defendant, Armour and Company.

[fol. 27] EXHIBIT "C"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY, et al., Defendants

JOURNAL ENTRY—Filed March 6, 1935

This day defendant Armour & Company presented to the court its petition and bond to remove the above entitled case to the District Court of the United States for the Western Division of the Northern District of Ohio, which were filed herein on March 1, 1935; and the court, having duly considered said petition, together with the record in said cause, including the petition filed by the plaintiff herein, and heard argument of counsel, finds that said petition for removal and bond were filed within the time allowed by law for the same. The court further finds that upon said record no separable controversy is shown, and said defendant is not entitled to the order of removal prayed for in its said petition, and its application for removal is therefore denied; to all of which the said defendant Armour & Company, by its attorneys, excepts.

(S.) James S. Martin, Judge.

[fol. 28] EXHIBIT "D"

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY, et al., Defendants

MOTION TO RECONSIDER PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES—Filed March 10th, 1936

Now comes your petitioner, Armour & Company, by its attorneys, Welles, Kelsey & Cobourn, and, not waiving or

intending to waive any rights heretofore set up by its prior pleadings in this cause and still relying and insisting upon its exceptions to each and all of the prior adverse orders of this court, respectfully shows that:

1. The petition for a removal of this cause to the District Court of the United States and a bond therefor were duly filed in this cause within the time allowed by law.

2. By journal entry filed herein on March 5, 1935, said petition was denied by this court upon the ground that "upon said record no separable controversy is shown and said defendant is not entitled to the order of removal prayed for in its said petition", to which order this defendant duly saved its exceptions.

[fol. 29] 3. That in a case decided on June 19, 1935, and reported on June 24, 1935, by the Supreme Court of Ohio, entitled The Canton Provision Company v. Gauder, 130 O.S. 43, said court decided that the liability of the wholesaler and retailer of food products was not a joint liability but a several one.

4. This defendant is advised by counsel that the foregoing opinion is determinative of the questions presented by the petition to remove in this case, and that said petition should be granted.

Wherefore, your petitioner moves the court for a reconsideration of the petition to remove this cause to the District Court of the United States, and prays that said petition for removal be granted.

Welles, Kelsey and Cobourn, Attorneys for Defendant, Armour & Co.

A brief in support of the foregoing motion is attached to and made a part of an identical motion in the case of Louisa F. Meinecke, Plaintiff, v. Armour & Company, et al., Defendants, No. 142032, to which the court is referred.

Welles, Kelsey and Cobourn, Attorneys for Defendant, Armour & Co.

[fol. 30] EXHIBIT "E"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY, et al., Defendants

JOURNAL ENTRY—Filed March 13, 1936

This cause came on to be heard upon the motion of defendant Armour & Company to reconsider the said defendant's petition for the removal of this cause to the District Court of the United States for the Northern District of Ohio, Western Division, and was argued by counsel and submitted to the court.

Upon consideration whereof the court finds that said motion ought to be, and is hereby, overruled; to all of which finding and order defendant Armour & Company at the time excepts.

James S. Martin, Judge.

OK. Welles, Kelsey & Cobourn, Attorneys for Deft. Armour & Co.

[fol. 31] EXHIBIT "F"

SUPREME COURT OF THE STATE OF OHIO

No. 27044

January Term, A. D. 1939

To-wit: November 30, 1938

THE STATE OF OHIO,
City of Columbus:

GEORGE E. KNEISS, Plaintiff & Appellee,

vs.

ARMOUR & COMPANY, Defendant & Appellant, et al.

Appeal from the Court of Appeals of Lucas County

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered

and adjudged by this Court that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and this cause is hereby remanded to said Court of Common Pleas of Lucas County, Ohio, with instructions to grant the petition to remove the cause to the District Court of the United States.

It is further ordered and adjudged that appellant recover [fol. 32] from appellee its costs expended in this Court, in the Court of Appeals and in the Court of Common Pleas for all proceedings subsequent to the date the petition for removal was filed, taxed at $—.

Ordered, That a special mandate be sent to the Court of Common Pleas of Lucas County, to carry this judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Lucas County, "for entry."

I, Seba H. Miller, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court this 7th day of December, 1938.

(S.) Seba H. Miller, Clerk, (S.) By Elliot E. Welch, Deputy. (Seal.)

SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus:

To the Honorable Court of Common Pleas.

[fol. 33] Within and for the County of Lucas, Toledo, Ohio, Greeting:

We do hereby command you, that you proceed, without delay, to carry the within and foregoing judgment of our Supreme Court of Ohio, in the cause of George E. Kneiss, Plaintiff & Appellee, vs. Armour & Company, Defendant & Appellant, et al., into execution.

Witness, Seba H. Miller, Clerk of our said Supreme Court of Ohio, at Columbus, this 7th day of December, A. D. 1938.
(S.) Seba H. Miller, Clerk, By (S.) Elliott E. Welch, Deputy. (Seal.)

Docket Fee $20.00 Paid by Welles, Kelsey & Cobourn.
Docket Fee $2.00 Paid by Percy R. Taylor.

[fol. 34] EXHIBIT "G"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY, et al., Defendants

JOURNAL ENTRY—Filed February 10, 1939

This day this cause came on to be heard upon the mandates from the Supreme Court of Ohio to this court, said mandates being dated December 7, 1938, and filed in this court on January 26, 1939, remanding said cause to this court with instructions to grant the petition to remove the cause to the District Court of the United States, and upon the motion and petition of defendant Armour & Company for removal of this cause from this court to the District Court of the United States, for the Northern District of Ohio, Western Division; and it appearing to the court and the court having heretofore found that defendant Armour & Company has filed with its petition for removal herein a bond, with good and sufficient surety, conditioned according to law, and that due notice thereof was given plaintiff; and it further appearing and the court having heretofore [fol. 35] found that said petition for removal, motion and bond were filed within the time allowed by law for the same;

It is, accordingly, ordered that the prior order of this court entered herein on or about March 6, 1935, denying said petition and motion for removal and the prior order of this court entered herein on or about March 14, 1936, denying the motion of Armour & Company to reconsider said petition for removal, be and each of said orders hereby is vacated, set aside and held for naught.

It is further, accordingly, ordered that said bond be and it is hereby accepted and approved by this court, and that

said cause be and it hereby is removed from this court to the District Court of the United States, for the Northern District of Ohio, Western Division, and that further proceedings herein be and they are hereby stayed, and that the clerk of this court be and is hereby directed and ordered to make a transcript of the record herein and certify the same as required by law.

To all of the foregoing findings and orders of the Court the plaintiff objects and excepts.

(Sgd.) Roy B. Stuart, Judge.

Dated: February 10, 1939.

[fol. 36] EXHIBIT "G-1"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 142031

MARIE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY et al., Defendants

JOURNAL ENTRY—Filed 2/10/39

The court's attention having been called to the decision of the Supreme Court of Ohio rendered on November 30, 1938, in the affiliated case of George E. Kniess vs. Armour & Co., et al., and reported in 134 O. S. 432; and the court taking judicial notice of the mandate in said cause returned to this court on January 26, 1939, on the court's own motion, this cause came on further to be heard this day on defendant Armour & Company's motion and petition for removal of this cause from this court to the District Court of the United States, for the Northern District of Ohio, Western Division; and it appearing to the court that said cause is removable under the statutes of the United States, and it appearing further and the court having heretofore found that defendant Armour & Company has filed with its petition for removal herein a bond, with good and sufficient surety, conditioned according to law, and that due notice thereof was given to plaintiff; and it further appearing and the court having heretofore found that said petition for removal, motion and bond were filed within the time allowed by law for the same;

It is, accordingly, ordered that the prior order of this [fol. 37] court entered herein on or about March 6, 1935, denying said petition and motion for removal and the prior order of this court entered herein on or about March 14, 1936, denying the motion of Armour & Company to reconsider said petition for removal, be and each of said orders hereby is vacated, set aside and held for naught.

It is further, accordingly, ordered that said bond be and it is hereby accepted and approved by this court, and that said cause be and it hereby is removed from this court to the District Court of the United States, for the Northern District of Ohio, Western Division, and that further proceedings herein be and they are hereby stayed, and that the clerk of this court be and is hereby directed and ordered to make a transcript of the record herein and certify the same as required by law.

To all of the foregoing findings and orders of the Court the plaintiff objects and excepts.

Roy R. Stuart, Judge.

Dated: February 10, 1939.

[fol. 38] EXHIBIT "H"

DISTRICT COURT OF THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 4338

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio, Plaintiff,

vs.

ARMOUR & COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

Filed 2/21/39

To the Clerk:

We, the Attorneys for the respective parties, do hereby stipulate that plaintiff may file his amended complaint herewith, without prejudice to the rights of the defendants to move to strike any new matter, and that the defendants' answers may stand as answers to the amended complaint.

Percy R. Taylor, Attorney for Plaintiff. Welles, Kelsey, Cobourn & Harrington, Attorney- for Defendant. Wm. F. Miller, Attorney for Defendant.

Notice Waived under Rule 77-D.

It is so ordered:

Frank L. Kloeb, U. S. District Judge.

[fol. 39] EXHIBIT "J"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

No. 4338

GEORGE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

MOTION TO REMAND CAUSE TO COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO—Filed March 2, 1939

Now comes the plaintiff in the above entitled cause, by his attorneys Nolan Boggs and Percy R. Taylor, and moves the Court to remand said cause to the Court of Common Pleas in and for the County of Lucas and State of Ohio, on the ground that this Court is without jurisdiction to hear and determine the cause and is without jurisdiction of either of the parties to or the subject matter of this suit for the reasons following:

1. Said cause is not one removable under the statutes and laws of the United States from said State Court to said United States District Court, for that plaintiff at the time of filing his said petition in said Court of Common Pleas was, and still is, an alien and not a citizen of the State of Ohio or of the United States; plaintiff having been born in the Country of Germany and being a citizen or subject [fol. 40] of that country and having come to the United States in the year 1925, after which he duly filed his application for his preliminary or first naturalization papers, but has not yet obtained his final naturalization papers or certificate and, therefore, is still not a citizen as aforesaid.

2. Said cause of action was improperly and unlawfully removed from said Court of Common Pleas to said United States District Court.

3. This is a suit to recover on a tort in which the actual facts, as shown upon the trial of said cause in the Court of Common Pleas of Lucas County, Ohio, are that defendants Armour & Company and Charles J. Burmeister are jointly liable to plaintiff. The facts constituting such joint negligence were not pleaded in plaintiff's petition filed in said court. It further appearing that said defendant Charles J. Burmeister has at all times been and is now a resident and citizen of the State of Ohio, this Court has no jurisdiction over this cause, and defendant Armour & Company is not entitled to remove this cause to this court.

In support of the foregoing motion, the plaintiff hereby refers to the affidavits hereto attached and made a part hereof, marked "Exhibit A" and "Exhibit B."

(Signed) Nolan Boggs and Percy R. Taylor, Attorneys for Plaintiff.

Pursuant to Rule 5 of the Federal Rules of Civil Pro-
[fol. 41] cedure, copies of this motion and of the brief in support of the same have been delivered to E. W. Kelsey, Jr., and Welles, Kelsey, Cobourn & Harrington, 807 Ohio Building, Toledo, Ohio, attorneys for defendant Armour & Company, and to Wm. F. Miller, 511 Edison Building, attorney for defendant Charles J. Burmeister, this 2nd day of March, 1939.

(Signed) Percy R. Taylor, Attorneys for George E. Kniess.

[fol. 42] EXHIBIT "J-1"

In the District Court of the United States for the Northern District of Ohio, Western Division

No. 4338

GEORGE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

AFFIDAVIT

STATE OF OHIO,
County of Lucas, ss:

George E. Kniess, being first duly sworn, deposes and says as follows:

This affiant was born on February 2, 1904, of German parents, in Eberstadt, Hessen, Germany. Affiant came to

the United States from Hamburg, Germany, arriving in the United States on September 3, 1925.

On March 3, 1928, affiant duly filed his Declaration of Intention to become a citizen of the United States, in the office of the Clerk of the Court of Common Pleas of Lucas County, Ohio, the same being application No. 13102 on the records of said court.

Thereafter, about July 6, 1931, affiant moved from his then residence in the City of Toledo, Ohio, to the City of Washington, in the District of Columbia, where he remained for some years.

[fol. 43] On July 5, 1932, affiant, while residing in said City of Washington, prepared his application for preliminary form for citizenship and presented the same at the office of the District Director of Naturalization, of the United States Department of Labor, at No. 462 Indiana Avenue, N. W., Washington, D. C. He was then and there told by the person apparently in charge of said office that he must wait for a time, but affiant does not know the reason for such advice or instruction so given to him.

Affiant supposed that he would be notified by said District Director of Naturalization when his said application would be considered, but has never been so advised.

By reason of the aforesaid facts, this affiant has never received his final Certificate of Naturalization as a citizen of the United States, and is not a citizen of the United States or of any state thereof, but is a citizen of Germany.

Affiant did not know or understand that he must file a petition for citizenship within seven years from the time of filing his Declaration of Intention to become such citizen, until now, and supposed that he had complied with the law in that respect, as aforesaid. Affiant, within the last week, for the first time advised his attorneys Percy R. Taylor and Nolan Boggs that he had not obtained his final Certificate [fol. 44] of Naturalization and pursuant to their advice, now given, is now filing his new preliminary application to become a citizen, with the Immigration and Naturalization Service, Detroit, Michigan, as affiant is married to an American citizen.

(Signed) George E. Kniess.

Sworn to before me, the undersigned, a Notary Public in and for Lucas County, Ohio, by the said George E.

Kniess, and by him subscribed in my presence, this 2nd day of March, 1939.

(Signed) Anthony S. Barone, Notary Public, Lucas County, Ohio. Com. expires 3/15/40. (Seal.)

[fol. 45] EXHIBIT "J-2"

In the District Court of the United States for the Northern District of Ohio, Western Division

No. 4338

GEORGE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

AFFIDAVIT

STATE OF OHIO,
County of Lucas, ss:

Percy R. Taylor, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff George E. Kniess in the above entitled cause, and has been such attorney since the filing of said suit in the Court of Common Pleas of Lucas County, Ohio, in which court its docket number was 141981.

Affiant further says that on the second and last trial of said cause in said Court of Common Pleas, the defendant Charles J. Burmeister, on cross-examination by Nolan Boggs, one of the attorneys of plaintiff, testified, as follows, as appears on pages 16 and 17 of the Bill of Exceptions taken on the trial of said cause and pages 46 to 49, inclusive, of the printed record of said cause filed in the Supreme Court of the State of Ohio:

"Q. Mr. Burmeister, calling your attention to 1934, did you make any purchase in the month of October of that year from Armour & Company of what is known in the trade as Boston butts?

A. Yes, sir.

[fol. 46] "Q. Can you recall when you made your first purchase of Boston butts, from them?

A. Yes, they were delivered in October, on the 8th, I think, on a Monday, but they were ordered several days before that.

"Q. And how did you order them and from whom did you order them?

A. Well, they asked me several weeks before whether I needed some butts for making metwurst and I told them——

"Q. Who asked you?

A. Ed Hauptman, the salesman.

"Q. What did he say?

A. He asked whether I needed some butts for making metwurst.

"Q. That is several weeks before October 4th?

A. Yes sir.

"Q. What did you tell him?

A. I told him I wasn't ready, the weather was too warm.

"Q. What if anything happened after that about ordering butts from Armour & Company?

A. I didn't understand the question. (Question withdrawn.)

"Q. Who is Mr. Ed. Hauptman, if you know?

A. He is salesman for Armour & Company that called on me.

"Q. On this occasion did he call on you or phone you?

A. No, he called on me but later on there was another salesman in the house that called me up and asked me about it.

"Q. Now I am referring to the fall of 1934, in October.

A. Yes sir.

"Q. And you placed your order on October 4th, is that correct, with Armour & Company?

A. Yes sir.

"Q. For how many Boston butts, what quantity?

A. About 300 pounds.

"Q. And you say some two weeks before that is when Mr. Ed Hauptman of Armour & Company called on you and wanted to know if you were ready for Boston butts to make metwurst?

A. I wouldn't say it was Hauptman or the man at the house, but they asked me about it.

[fol. 47] "Q. Who was the other man?

A. George Gradel.

"Q. It was either Mr. Hauptman or George Gradel that called you and wanted to know if you were ready to make metwurst?

A. Yes sir.

"Q. And that was about two weeks prior to October 4th, 1934?

A. That is right.

"Q. And they also wanted to know whether or not you were ready for Boston butts, is that right?

A. Yes sir.

"Q. Then later on did Mr. Hauptman call at your place of business and you gave him this order, or did you give it to him on the telephone?

A. He called at the place of business.

"Q. And you gave him the order for the Boston butts, 300 pounds, on October 4th, 1934?

A. Yes.

"Q. And you say they were delivered to you on Monday, October 8th?

A. The following Monday, yes sir.

"Q. Now Mr. Burmeister, when you gave this order to Mr. Hauptman on October 4th, I wish you would tell the jury just what was said by Mr. Hauptman to you or by you to Mr. Hauptman about these Boston butts and the making of metwurst at that time on October 4th.

A. I couldn't recall the exact words.

"Q. Well, tell us the substance of it as near as you can.

A. As near as I can remember he asked me whether I was ready to make metwurst and I told him yes, I said, Put in the order for 300 pounds and that would be delivered the following Monday. He generally called at my place of business twice a week, Monday and Thursday.

"Q. And you then gave him the order for 300 pounds of Boston butts?

A. Yes sir.

"Q. And you told him you were ready to place the order and you were ready to make some metwurst, is that right?

A. Yes sir."

This affiant further says that at the time of preparing and filing said petition in behalf of plaintiff in said Court of Common Pleas and at the time of the first trial of said [fol. 48] cause, neither plaintiff nor said Nolan Boggs, nor this affiant had any knowledge or information as to the

aforesaid statements so made by the said defendant Burmeister on said second trial.

Percy R. Taylor.

Sworn to before me and subscribed in my presence this 2nd day of March, 1939. John R. Calder, Notary Public, Lucas County, Ohio. My Commission expires October 20, 1939. (Seal.)

[fol. 49] EXHIBIT "K"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 4340

MARIE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

MOTION TO REMAND CAUSE TO COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO—Filed Mar. 4, 1939

Now comes the plaintiff in the above entitled cause, by her attorneys Nolan Boggs and Percy R. Taylor, and moves the Court to remand said cause to the Court of Common Pleas in and for the County of Lucas and State of Ohio, on the ground that this Court is without jurisdiction to hear and determine the cause and is without jurisdiction of either of the parties to or the subject matter of this suit for the reasons following:

1. Said cause of action was improperly and unlawfully removed from said Court of Common Pleas to said United States District Court.

2. This is a suit to recover on a tort in which the actual facts, as shown upon the trial of said cause in the Court of Common Pleas of Lucas County, Ohio, are that defendants Armour & Company and Charles J. Burmeister are jointly liable to plaintiff. The facts constituting such joint negligence were not pleaded in plaintiff's petition filed in said court. It further appearing that said defendant Charles J.

Burmeister has at all times been and is now a resident and citizen of the State of Ohio, this Court has no juris-
[fol. 50] diction over this cause, and defendant Armour & Company is not entitled to remove this cause to this court.

In support of the foregoing motion, the plaintiff hereby refers to the affidavit hereto attached and made a part hereof marked "Exhibit A."

Nolan Boggs and Percy R. Taylor, Attorneys for Plaintiff.

For brief in support of the above motion, reference is respectfully made to brief in behalf of plaintiff filed in support of like motion in Case No. 4339.

Percy R. Taylor, of Counsel for Plaintiff.

Pursuant to Rule 5 of the Federal Rules of Civil Procedure, copies of this motion and of the brief in support of the same have been delivered to Welles, Kelsey, Cobourn & Harrington, 807 Ohio Building, Toledo, Ohio, attorneys for defendant Armour & Company, and to Wm. F. Miller, 511 Edison Building, attorney for defendant Charles J. Burmeister, this 3rd day of March, 1939.

Percy R. Taylor, Attorneys for Marie Kniess.

[fol. 51] EXHIBIT "K-1"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 4340

MARIE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

AFFIDAVIT

STATE OF OHIO,
County of Lucas, ss:

Percy R. Taylor, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff Marie Kniess in the above entitled cause, and has been such attorney since the filing of said suit in the Court of Common Pleas of

Lucas County, Ohio, in which court its docket number was 142031.

Affiant further says that on the second and last trial of said cause in said Court of Common Pleas, the defendant Charles J. Burmeister, on cross-examination by Nolan Boggs, one of the attorneys of plaintiff, testified, as follows, as appears on pages 16 and 17 of the Bill of Exceptions taken on the trial of said cause and pages 45 to 59 inclusive, of the printed record of said cause filed in the Supreme Court of the State of Ohio:

"Q. Mr. Burmeister, calling your attention to 1934, did you make any purchase in the month of October of that year from Armour & Company of what is known in the trade as Boston butts?

A. Yes sir.

[fol. 52] "Q. Can you recall when you made your first purchase of Boston butts, from them?

A. Yes, they were delivered in October, on the 8th, I think, on a Monday, but they were ordered several days before that.

"Q. And how did you order them and from whom did you order them?

A. Well, they asked me several weeks before whether I needed some butts for making metwurst and I told them——

"Q. Who asked you?

A. Ed Hauptman, the salesman.

"Q. What did he say?

A. He asked whether I needed some butts for making metwurst.

"Q. That is several weeks before October 4th?

A. Yes sir.

"Q. What did you tell him?

A. I told him I wasn't ready, the weather was too warm.

"Q. What if anything happened after that about ordering butts from Armour & Company?

A. I didn't understand the question. (Question withdrawn.)

"Q. Who is Mr. Ed. Hauptman, if you know?

A. He is salesman for Armour & Company that called on me.

"Q. On this occasion did he call on you or phone you?

A. No, he called on me but later on there was another salesman in the house that called me up and asked me about it.

"Q. Now I am referring to the fall of 1934, in October.

A. Yes sir.

"Q. And you placed your order on October 4th, is that correct, with Armour & Company.

A. Yes sir.

"Q. For how many Boston butts, what quantity.

A. About 300 pounds.

"Q. And you say some two weeks before that is when Mr. Ed Hauptman of Armour & Company called on you and wanted to know if you were ready for Boston butts to make metwurst?

A. I wouldn't say it was Hauptman or the man at the house, but they asked me about it.

"Q. Who was the other man?

A. George Gradel.

"Q. It was either Mr. Hauptman or George Gradel that called you and wanted to know if you were ready to make metwurst?

A. Yes sir.

[fol. 53] "Q. And that was about two weeks prior to October 4th, 1934?

A. That is right.

"Q. And they also wanted to know whether or not you were ready for Boston butts, is that right?

A. Yes sir.

"Q. Then later on did Mr. Hauptman call at your place of business and you gave him this order, or did you give it to him on the telephone?

A. He called at the place of business.

"Q. And you gave him the order for the Boston butts, 300 pounds, on October 4th, 1934?

A. Yes.

"Q. And you say they were delivered to you on Monday, October 8th?

A. The following Monday, yes sir.

"Q. Now Mr. Burmeister, when you gave this order to Mr. Hauptman on October 4th, I wish you would tell the jury just what was said by Mr. Hauptman to you or by you to Mr. Hauptman about these Boston butts and the making of metwurst at that time on October 4th.

A. I couldn't recall the exact words.

"Q. Well, tell us the substance of it as near as you can.

A. As near as I can remember he asked me whether

I was ready to make metwurst and I told him yes, I said, Put in the order for 300 pounds and that would be delivered the following Monday. He generally called at my place of business twice a week, Monday and Thursday.

"Q. And you then gave him the order for 300 pounds of Boston butts?

A. Yes sir.

"Q. And you told him you were ready to place the order and you were ready to make some metwurst, is that right.

A. Yes sir."

This affiant further says that at the time of preparing and filing said petition in behalf of plaintiff in said Court of Common Pleas and at the time of the first trial of said cause, neither plaintiff nor said Nolan Boggs, nor this affiant had any knowledge or information as to the aforesaid [fol. 54] statements so made by the said defendant Burmeister on said second trial.

Percy R. Taylor.

Sworn to before me and subscribed in my presence this 3rd day of March, 1939. Ray M. Beckwith, Notary Public, Lucas County, Ohio. My Commission expires Aug. 11, 1939. (Seal.)

[fol. 55] EXHIBIT "L"

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 4338. Civil

GEORGE E. KNIESS

vs.

ARMOUR & COMPANY et al.

No. 4339. Civil

LOUISA F. MEINECKE

vs.

ARMOUR & COMPANY et al.

No. 4340. Civil

MARIE KNIESS

vs.

ARMOUR & COMPANY et al.

No. 4341. Civil

HERBERT O. SCHWALBE

vs.

ARMOUR & COMPANY et al.

No. 4342. Civil

MAYBELLE SHWALBE

vs.

ARMOUR & COMPANY et al.

Toledo, Ohio, April 1, 1939.

NOTICE OF RULING OF COURT ON MOTION TO REMAND

"Motion to remand sustained in each case—#4338, 4339, 4340, 4341, 4342.

Frank L. Kloeb, U. S. District Judge."

NOTE. An order has been entered accordingly by the Clerk.

To: Percy R. Taylor, 740 Spitzer Bldg., Toledo, Ohio; Nolan Boggs, 826 Nicholas Bldg., Toledo, Ohio, Attorneys for Plaintiffs.

To: Edward W. Kelsey, Jr., 807 Ohio Bldg., Toledo, Ohio; William F. Miller, 511 Edison Bldg., Toledo, Ohio, Attorneys for Defendants.

Very respectfully, C. B. Watkins, Clerk, by George H. Blossom, Deputy Clerk.

[fol. 56] EXHIBIT "M"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil Action File No. 4338

GEORGE E. KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

MOTION TO VACATE AND SET ASIDE ORDER OF REMAND—Filed April 22nd, 1939

Now comes the defendant, Armour & Company, by its attorneys, Welles, Kelsey, Cobourn & Harrington, and moves the court for an order setting aside and vacating the purported order of remand made in this cause on April 1, 1939, and in support of this motion respectfully shows the court:

1. As more fully appears from the record of the Court of Common Pleas of Lucas County, Ohio, heretofore filed in this cause, within the time allowed by law, this defendant filed in said Court of Common Pleas:

(a) Petition for removal to the District Court of the United States;

(b) Notice of filing the same;

[fol. 57] (c) Bond on removal; and

(d) Motion for removal.

2. Thereafter the plaintiff requested and received a hearing in the Court of Common Pleas of Lucas County, Ohio, on the petition for removal, and said Court, after a full hearing, denied said petition and signed a certain journal entry to that effect. A certified copy of said journal entry is included in the record heretofore filed in this court.

3. On March 10, 1936, defendant, Armour & Company, filed in the Common Pleas Court of Lucas County, Ohio, a motion to reconsider the petition for removal. A certified copy of said motion is included in the record heretofore filed in this cause.

4. On March 14, 1936, said Common Pleas Court of Lucas County, Ohio, after a full hearing accorded all parties,

denied said motion to reconsider the petition for removal, and entered a journal entry to that effect. A certified copy of said journal entry is included in the record heretofore filed in this cause.

5. Thereafter this cause proceeded to trial, and on November 30, 1938, the Supreme Court of Ohio rendered its [fol. 58] decision in this cause (reported in 134 O. S. 432), the court holding in the syllabi:

"Where a citizen of Ohio and a citizen of another state are joined as defendants, the cause should be removed to the federal courts when a separable controversy exists between the resident plaintiff and the non-resident defendant.

"In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tort-feasors. (Canton Provision Co. v. Gauder, 130 Ohio St., 43, approved and followed.)"

6. Thereafter the said George E. Kniess filed in the Supreme Court of Ohio an application for a rehearing, which application was on January 25, 1939, denied.

7. On January 26, 1939, the mandate from the Supreme Court of Ohio was returned to the Court of Common Pleas of Lucas County, Ohio. A certified copy of said mandate appears in the record heretofore filed in this cause.

8. On February 10, 1939, pursuant to the mandate of the Supreme Court of Ohio, the Common Pleas Court of Lucas County, Ohio, set aside the prior order denying the petition and order for removal and set aside the prior order denying [fol. 59] the motion to reconsider said petition for removal, and ordered this cause removed to the District Court of the United States for the Northern District of Ohio, Western Division. A certified copy of said journal entry appears in the record heretofore filed in this cause.

9. Pursuant to said journal entry, a transcript of the record in the Court of Common Pleas of Lucas County, Ohio, certified as required by law, was filed on February 17, 1939, in the District Court of the United States for the Northern District of Ohio, Western Division, and docketed as this cause.

10. On February 20, 1939, pursuant to the Federal Rules of civil procedure, defendant, Armour & Company, filed a separate answer in this cause.

11. On February 22, 1939, a certain stipulation was filed in this cause, permitting the plaintiff to file an amended complaint without prejudice to the rights of the defendant to move to strike any new matter, said stipulation further providing that the defendants' answers should stand as answers to the amended complaint.

12. On February 22, 1939, the plaintiff filed an amended complaint in this cause.

[fol. 60] 13. On March 1, 1939, defendant, Charles J. Burmeister, filed his separate answer in this cause.

14. On March 3, 1939, the plaintiff herein filed a motion to remand this cause.

15. On March 16, 1939, defendant, Armour & Company, filed in said District Court in this cause a motion, pursuant to Judicial Code Section 274 (28 U. S. C. A. Sec. 399) to amend the petition for removal to correctly state the facts, in the event it was ascertained that the plaintiff was a citizen and subject of Germany, as he claimed in his motion to remand.

16. On April 1, 1939, this court entered a certain purported order in this cause, sustaining the motion to remand, and ordering the cause remanded. This court did not render any opinion on the motion to remand. As stated in a brief filed by the plaintiff in the Supreme Court of Ohio on April 17, 1939:

"* * * the Federal Court must have examined and in fact did examine, the facts of each case and reached the conclusion that no separable controversy was really presented."

17. The purported order of remand entered by this court necessarily holds that a separable controversy was not presented on the record in this cause, and in the opinion of [fol. 61] counsel for defendant, Armour & Company, purports to exercise jurisdiction that this court does not possess, i. e., a jurisdiction to review and reverse the decision and order of the Supreme Court of Ohio and the orders of the Court of Common Pleas of Lucas County, Ohio, which

decision and orders are conclusive on all courts, including said United States District Court, subject to such review by appeal or error as may exist in the Appellate Courts of Ohio and the Supreme Court of the United States.

18. In the opinion of counsel for defendant, Armour & Company, the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, have full and complete jurisdiction to determine whether or not the plaintiff's petition in these causes stated a joint cause of action against Armour & Company and Charles J. Burmeister, the other defendant. In fact, it has been uniformly held that that question is determined exclusively by the laws of Ohio on that subject as construed by the courts of Ohio.

19. In the opinion of counsel for defendant, Armour & Company, the plaintiff, George E. Kniess, sought, and after a full hearing, secured the opinion, decision and judgment of the Supreme Court of Ohio, and the opinion, decision and judgment of the Court of Common Pleas of Lucas County, [fol. 62] Ohio, on that precise question, and said opinions, decisions and judgments are, as between the parties to this cause, res adjudicata and final.

20. In the opinion of counsel for the defendant, Armour & Company, this court is required by 28 U. S. C. A. 687 (R. S. 905) to give full faith and credit to the opinions, decisions and judgments entered in this cause, after full hearings accorded all parties in interest, by the Supreme Court of Ohio and by the Court of Common Pleas of Lucas County, Ohio.

21. In the opinion of counsel for defendant, Armour & Company, said motion to remand did not and could not present any question for determination to this court that had not theretofore been presented to and finally and conclusively determined by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio.

22. In the opinion of counsel for defendant, Armour & Company, said order of remand in this cause further denied the defendant, Armour & Company, the right to amend the petition for removal, as requested in said defendant's motion therefor, pursuant to Judicial Code Section 274c (March 3, 1915, c. 90, 38 Stat. 956; 28 U. S. C. A. 399).

[fol. 63] 23. In the opinion of counsel for defendant, Armour & Company, the amended complaint filed by the plaintiff herein and the stipulation in regard thereto waived any defects in the removal proceedings, which defects, if in fact they exist, were but formal and modal, and the filing of said amended petition and said stipulation was a stipulation to the jurisdiction of this court and a consent to the removal proceedings, for which further reason the plaintiff in this cause is estopped to question the jurisdiction of this court.

24. In the opinion of counsel for defendant, Armour & Company, this court in purporting to remand this cause has transcended the jurisdiction of this court and undertaken to exercise powers not vested in this court by any law of the United States.

(S.) Welles, Kelsey, Cobourn & Harrington, (S.) Edward W. Kelsey, Jr., (S.) Fred A. Smith, Attorneys for Armour & Company, Address: 807 Ohio Building, Toledo, Ohio.

Pursuant to Rule 5 of the Federal Rules of Civil Procedure, copies of this motion have been delivered to Nolan [fols. 64-65] Boggs, 826 Nicholas Building, Toledo, Ohio, and Percy R. Taylor, 740 Spitzer Building, Toledo, Ohio, attorneys for plaintiff, this 22nd day of April, 1939.

(S.) Welles, Kelsey, Cobourn & Harrington, (S.) Edward W. Kelsey, Jr., (S.) Fred A. Smith, Attorneys for Armour & Company.

[fols. 66-70] [File endorsement omitted]

[fol. 71] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Title omitted]

Memorandum in Support of Motion for Leave to File Petition for Writ of Mandamus—Filed July 7, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

PRELIMINARY STATEMENT

Five individuals (hereinafter referred to as Kneiss, et al., instituted separate suits in the Court of Common Pleas of Lucas County, Ohio against petitioner, Armour and Com-

pany, and Charles J. Burmeister as defendants. Each plaintiff is represented by the same counsel and the pleadings in each case are in all material respects identical.

The petitions of Kniess, et al., claim that Armour & Company, a non-resident foreign corporation, sold certain fresh pork to Burmeister, a Toledo grocer. It was further claimed that Burmeister took the fresh pork and ground it up into a smoked sausage known as "mettwurst", which was "a food product ready to be eaten without cooking or further treatment".

Kniess, et al., claimed to have purchased some of this [fol. 72] smoked sausage from Burmeister and, as a result of eating it, claim to have acquired a parasitic disease known as "Trichinosis", which is caused by eating improperly cooked or cured pork.

Within the time allowed by law, Armour & Company filed a petition and bond for removal to the District Court of the United States, for the Northern District of Ohio, Western Division, on the grounds that the plaintiff's claim, if any, against Armour & Company was separate and distinct from their claim against the resident defendant, Burmeister.

A full hearing was had in the Court of Common Pleas as to whether or not these causes were removable, and that court originally held that they were not. The Common Pleas Court also held the cases were not removable in passing on a motion to reconsider the question filed subsequent to the decision of the Supreme Court of Ohio, in the case of Canton Provision Company v. Gauder, 130 O. S. 43.

Thereafter substantially identical pleadings were filed in all causes, Armour & Company preserving an exception to the rulings of the Court of Common Pleas on the petition for removal, and by agreement of all parties, the George E. Kniess case proceeded to trial as a "test case", and the other cases were permitted to remain pending in the Court of Common Pleas.

After two trials, the Supreme Court of Ohio sustained an appeal as of right and granted a motion to certify in the George E. Kniess case. In an opinion handed down by the [fol. 73] Supreme Court of Ohio on November 30, 1938, and reported in 134 O. S. 432, the Supreme Court of Ohio held:

"Where a citizen of Ohio and a citizen of another state are joined as defendants, the cause should be removed to the federal courts when a separable controversy exists be-

tween the resident plaintiff and the non-resident defendant." (Syl. 1.)

"In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tortfeasors." (Syl. 2.)

In the course of the opinion, the Supreme Court concluded:

"As the allegations of the petition stand it can hardly be said that the liability of Armour & Company would be the same when the pork was sold in metwurst as it would be if Burmeister had sold the Boston butts over the counter in the same form as he received them from Armour & Company. In either instance, however, the liability of Armour & Company was primary and that of Burmeister secondary. There was no privity of contract between Kniess and Armour & Company as there was between Kniess and Burmeister. Differing in degree, and differing in nature, the liability of Armour & Company and Burmeister cannot be joint. Their alleged torts were different in character and kind, and were not concurrent. Morris v. Woodburn, 57 Ohio St., 330, 48 N. E., 1097, Village of Mineral City v. Gilbow, 81 Ohio St., 263, 90 N. E. 800.

"For the reasons stated we are constrained to hold that a separable controversy did exist between the plaintiff Kniess, and Armour & Company. The defendant, Armour & Company, adequately preserved its exceptions to the ruling of the court denying the petition for removal. * * * For the reasons stated the trial court erred, and the cause is therefore reversed and remanded to the Court of Common Pleas with instructions to grant the petition of Armour & Company to remove the cause to the District Court of the United States." (Pp. 444, 445.)

[fol. 74] Pursuant to the mandate of the Supreme Court of Ohio in the George E. Kniess case, returned to the Court of Common Pleas of Lucas County, Ohio on January 26, 1939, the Court of Common Pleas set aside and vacated its previous orders denying the petition for removal, approved the bond, and ordered all five cases removed to the District Court of the United States.

Thereafter the plaintiffs in the District Court filed motions to remand, claiming that while the pleadings did not show any joint claim against the two defendants, that the "facts" would show such a joint claim. Upon that basis the District Court accordingly ordered all five of these cases remanded to the Common Pleas Court of Lucas County, and disregarded the petitioner's claim that the District Court could not properly consider any matters that were not presented to the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, and that such consideration was barred by the proceedings taken in the state courts, which ripened into a final judgment constituting res judicata.

CONTENTIONS OF PETITIONER

The contentions of the petitioner, which will be discussed in the order listed below, are briefly as follows:

1. The United States District Court erred in entering an order of remand in these causes and in refusing to vacate said order of remand for the reason that

[fol. 75] (a) The Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio has full jurisdiction to determine whether or not the plaintiff had properly joined petitioner and the resident defendant. (See paragraph No. 21 of petition for writ of mandamus.)

(b) Whether or not petitioner and the resident defendant were properly joined is determined exclusively by the law of Ohio. (See paragraph No. 21 of petition for writ of mandamus.)

(c) The power of the District Court to pass upon the question of whether or not the petitioner and the resident defendant were properly joined was barred by the proceedings taken in the state courts, which ripened into a final judgment constituting res judicata. (See paragraphs No. 20 to 23 inclusive of petition for writ of mandamus.)

(d) In determining whether or not the plaintiff properly joined petitioner and the resident defendant, the District Court could not properly consider any matters that were not presented to and considered by the Supreme Court of

Ohio and the Court of Common Pleas of Lucas County, Ohio. (See paragraph No. 24 of petition for writ of mandamus.)

2. The erroneous orders of remand entered by the District Court are not reviewable by appeal or error, and a writ of mandamus is a proper method of correcting the error. (See paragraphs Nos. 25 to 30 inclusive of petition for writ of mandamus.)

[fol. 76] ARGUMENT AND LAW

1. The United States District Court Erred in Entering an Order of Remand in these causes and in Refusing to Vacate said Order of Remand for the reason that—

(a) The Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, had full Jurisdiction to Determine whether or not the Plaintiff had properly Joined Petitioner and the Resident Defendant. (See paragraph No. 21 of petition for writ of mandamus.)

This point is admitted by counsel for Kniess, et al. On page 18 of the brief of George E. Kniess, filed in the Supreme Court of Ohio, opposing the motion of Armour & Company to certify record, etc., it is stated:

"No question is made but that Armour & Company presented a petition for removal of this suit as against it, together with a sufficient bond, to the Court of Common Pleas, within the statutory period for so doing.

"It is, however, well settled that the court to which such a petition is presented has jurisdiction, in the first instance, to examine the petition for removal of the cause, and to deny such removal if it shall appear that the petitioner is not entitled thereto.

Burlington C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. Ed. 1159.
Powers v. C. & O. R. Co., 65 Fed. 129, affirmed 169 U. S. 92, 42 L. Ed. 673.
Missouri K. & T. R. Co. v. Chappell, 206 Fed. 688.
Miller v. Soule, 221 Fed. 493.

* * * * * * *

[fol. 77] "In determining whether a separable controversy exists entitling a defendant to remove the action against it to the federal court, the state court has before it 'a pure

question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit.'

Cyclopedia of Federal Procedure, Vol. II, Page 177.
Burlington C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. Ed. 1159."

(b) Whether or not the Petitioner and the Resident Defendant were Properly Joined is Determined Exclusively by the Law of Ohio. (See paragraph No. 21 of petition for writ of mandamus).

This point is likewise admitted in the said brief of George E. Kniess filed in the Supreme Court of Ohio, as it is stated at pages 22 and 24 of said brief.

"Furthermore, 'the right to join defendants in the state court, and the question whether the petition or complaint states a joint cause of action against them, are to be determined according to the law of the state where the action was brought, and not according to the Federal law.'

"54 C. J., Page 293.

* * * * * * *

"The state law determines the right to join defendants in the state court whether the petition states a joint cause of action against them, on the question of removal to the federal court as a separable controversy.

[fol. 78] "C. & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. Ed., 121;
Hancock v. Railroad Co., 28 Fed. (2d) 45;
Stephens v. Southern Pacific Co., 16 Fed. (2d) 288."

The correct rule was recognized and stated by the Supreme Court of Ohio in its opinion in the Kniess case

"It has always been held that the law of the state from which removal is sought determines whether the controversy is a separable one. Cincinnati, N. O. & T. P. Rd. Co. v. Bohon, 200 U. S., 221, 50 L. Ed., 448, 26 S. Ct., 166; Chicago & Alton Ry. Co. v. McWhirt, 243 U. S. 422, 61 L. Ed., 826, 37 S. Ct. 392; Chicago, Rock Island & Pacific Ry. v. Dowell, 229 U. S. 102, 57 L. Ed., 1090, 33 S. Ct., 684; Norwalk,

Admx., v. Air-Way Electric Appliance Corp., 87 F. (2d) 317, 110 A. L. R., 183, and see annotation at page 191." (P. 437.)

Kniess v. Armour, 134 O. S. 432."

(c) The Power of the District Court to pass upon the Question of whether or not the Petitioner and the Resident Defendant were Properly Joined was Barred by the Proceedings taken in the State Courts which Ripened into a Final Judgment Constitutes res judicata. (See paragraphs No. 20 to 23 Inc. of petition for writ of mandamus.)

It is the contention of petitioner that Kniess et al. had a right to litigate the question as to whether or not the petitioner and Burmiester were properly joined, either in the state court or in the Federal Court. Kniess, et al., had they desired to do so, could have permitted the Common [fol. 79] Pleas Court to issue an ex parte order of removal. On the other hand, Kniess, et al. could, and in this instance, did, request and receive a hearing on that question in the Court of Common Pleas and in the Court of Appeals of Lucas County, Ohio and in the Supreme Court of Ohio.

Armour & Company, by remaining in the state court, likewise waived any right it had to secure, by filing a proper transcript in the District Court without awaiting the action of the state court, an original determination of that question by the District Court of the United States.

It is the contention of petitioner that an adequate state remedy was available to Kniess, et al., and having invoked that and pursued it to final judgment, Kniess, et al. cannot escape the effect of that adjudication.

We believe this principle was fully discussed and settled in the case of American Surety Company v. Baldwin, 287 U. S. 156. In this case a state court entered a judgment against a surety company without notice to it in violation of the due process clause of the Fourteenth Amendment. The surety company appeared in the State Court and made a motion to vacate the judgment. The State Court held that it had jurisdiction to enter the judgment, whereupon the surety company filed suit in the Federal Court for an injunction, claiming that the action in the State Court deprived it of due process of law. In holding that the decision of the State Court on the motion to vacate was final

[fol. 80] and res judicata, the Supreme Court of the United States, in the opinion by Mr. Justice Brandeis, said:

"The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment, compare National Exchange Bank v. Wiley, 195 U. S. 257; Cooper v. Newell, 175 U. S. 555. And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure. Simon v. Southern Ry. Co., 236 U. S. 115; Atchison, Topeka & Santa Fe Ry. Co. v. Wells, 265 U. S. 101; Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814. But an adequate state remedy was available; and having invoked that and pursued it to final judgment, the Surety Company cannot escape the effect of the adjudication there. Compare Mitchell v. First National Bank, 180 U. S. 471, 480-481; Lion Bonding Co. v. Karatz, 262 U. S. 77, 90.

"The Supreme Court of Idaho had jurisdiction over the parties and of the subject matter in order to determine whether the trial court had jurisdiction. Clearly, the motion to vacate, made on a general appearance, and the appeal from the order thereon, were no less effective to confer jurisdiction for that purpose than were the special appearance and motion to quash and dismiss held sufficient in Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522. And there was an actual adjudication in the state court of the question of the jurisdiction of the trial court to enter judgment. The scope of the issues presented involved an adjudication of that issue. Compare Napa Valley Elec. Co. v. Railroad Commn., 251 U. S. 366; Grubb v. Public Utilities Commn., 281 U. S. 470, 477-478. * * * With the soundness of the decision we are not here concerned. It is enough that the court did not, as the Surety Company asserts, reach its decision by merely assuming the point in issue, or by deeming itself concluded by the [fol. 81] fact that the trial court took jurisdiction. That it did not so reach its decision is made clear by the opinion itself. We are thus brought to a consideration of the effect on the present suit of the judgment of the Supreme Court of Idaho.

"The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a

state court drawn in question in an independent proceeding in the federal courts. Act of May 26, 1790, c. 11; Act of March 27, 1804, c. 56, § 2; Rev. Stat. §905; Mills v. Duryee, 7 Cranch 481, 485; Insurance Co. v. Harris, 97 U. S. 331, 336. Compare Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 155. The principles of res judicata apply to questions of jurisdiction as well as to other issues. Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522. They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. See Marshall v. Holmes, 141 U. S. 589, 596; Fidelity & Deposit Co. v. Gaston, Williams & Wigmore, 13 F. (2d) 267, aff'd per curiam, id., 268. The principles of res judicata may apply, although the proceeding was begun by motion. Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, res judicata, and precludes a suit to enjoin enforcement of the judgment. Bernhard v. Idaho Bank & Trust Co., 21 Idaho 598; 123 Pac. 481. Since the decision would formally constitute res judicata in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction *might have been presented to the state Supreme Court and reviewed here,* the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction. Cf. Fidelity Nat. Bank & Trust Co. v. Swope, 274 U. S. 123, 130-131." (PP. 164, 165, 166, 167.) (Italics ours.)

[fol. 82] To the same effect is Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522. In this case a suit was instituted in the Missouri State Court and removed to the District Court, whereupon the defendant appeared specially and moved to quash and dismiss for want of service. After the hearing, the motion was overruled with leave to plead within thirty days. No plea having been filed, the cause proceeded to judgment. Thereafter, the plaintiff brought suit on the judgment in the District Court for Iowa, and the defendant set up as a defense that it had not been served on the Missouri judgment, and hence the judgment was invalid, etc. The plaintiff objected to proof of such matters, claiming that the judgment on the motion

in the first case was res judicata. In holding that the first judgment was res judicata, the Supreme Court in the opinion by Mr. Justice Roberts said:

"The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. That fact would be important upon appeal from the judgment, and would save the question of the propriety of the court's decision on the matter even though after the motion had been overruled the respondent had proceeded, subject to a reserved objection and exception, to a trial on the merits. Harkness v. Hyde, 98 U. S. 476; Goldey v. Morning News, 156 U. S. 518; Toledo Rys. & Lt. Co. v. Hill, 244 U. S. 49; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229; Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405. The special appearance gives point to the fact that the respondent entered the Missouri court for the [fol. 83] very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. Thompson v. Whitman, 18 Wall. 457; Pennoyer v. Neff, 95 U. S. 714; Hart v. Sansom, 110 U. S. 151; Wetmore v. Karrick, 205 U. S. 141; Bigelow v. Old Dominion Copper Co., 225 U. S. 111; McDonald v. Mabee, 243 U. S. 90. It had also the right to appeal from the decision of the Missouri District Court as is shown by Harkness v. Hyde, supra, and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud,

be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

"While this Court has never been called upon to determine the specific question here raised, several federal courts have held the judgment *res judicata* in like circumstances. Phelps v. Mutual Life Assn., 112 Fed. 453; affirmed on other grounds, 190 U. S. 147; Moch v. Insurance Co., 10 Fed. 696; Thomas v. Virden, 160 Fed. 418; Chinn v. Foster-Milburn Co., 195 Fed. 158. And we are in accord with this view." (Pp. 524, 525, 526.)

From the foregoing cases and authorities, we submit that [fol. 84] it is well settled that the principles of res judicata apply to question of jurisdiction, as well as to other issues. An adequate state remedy being available, Kniess, et al., having invoked and pursued it to final judgment, cannot escape the effect of the final adjudication by the state courts. Since the issue was presented to and determined by the state courts, and might have been reviewed by the Supreme Court of the United States, the decision of the state courts was a bar to any re-examination of that question by the district court.

We earnestly submit that the authorities heretofore set forth in sub-paragraphs (a), (b) and (c) conclusively support the allegations contained in Paragraphs 20, 21, 22 and 23 of our petition. Whether the defendants are properly joined must be determined by the laws of Ohio. Kniess, et al. do not challenge that statement. The decision by the Supreme Court of Ohio, therefore, is res adjudicata and final. Consequently, no judicial question was presented to the District Court for its decision or discretion and its assumed determination was an unwarranted appellate review of the decision of the Supreme Court of Ohio. The judicial power to review that decision rests with the Supreme Court of the United States and not with the United States District Court for the Northern District of Ohio.

[fol. 85] (d) In determining whether or not the plaintiff properly joined Petitioner and the Resident Defendant, the District Court could not properly consider any matters that were not presented to and considered by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio. (See paragraph No. 24 of petition for writ of mandamus).

Kniess, et al. have contended that while the State Court is limited to an examination of the pleadings as they stood at the time the petition for removal was filed, in determining whether or not the plaintiffs had stated a joint cause of action against petitioner and Burmeister, the Federal Court has broader powers. It is the contention of Kniess that the Federal Court considered the "facts" to see if it is possible or probable that the "facts" will show a joint cause of action.

[fol. 86] In the first place we do not believe there were any "facts" presented to the Federal Court for consideration, but be that as it may, it is well settled by numerous cases decided by the Supreme Court of the United States that the District Court in considering whether or not a joint cause of action was stated against petitioner and Burmeister, was limited to a consideration of the pleadings on file at the time the petition for removal was filed, exactly in the same manner as the State Court.

The most recent case discussing that question is Pullman Co. v. Jenkins (decided January 16, 1939), 305 U. S. 534. This case was removed from the State Court and a motion to remand was denied by the District Court. The Circuit Court of Appeals reversed the District Court. In passing upon the action of the lower courts, the Supreme Court of the United States in an opinion by Chief Justice Hughes said:

"On appeal, the Circuit Court of Appeals, passing the other questions, held that if it did not sufficiently appear at the time of the petition for removal that the cause was not separable, it did so appear when the second amended complaint was filed and hence that the District Court erred in denying the motion to remand. 96 F. 2d p. 410. This ruling was placed upon an erroneous ground. *The second amended complaint should not have been considered in determining the right to remove,* which in a case like the present one *was to be determined according to the plaintiffs' pleading at the time of the petition for removal.* Barney v. Latham, 103 U. S. 205, 213-216; Graves v. Corbin, 132 U. S. 571, 585; Louisville & Nashville R. Co. v. Wangelin, 132 U. S. 599, 601; Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 189, 190; Saint Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 294, 295." (pp. 537, 538) (Italics ours).

[fol. 87] The correct rule was recognized and properly stated in the prior opinion of the Supreme Court of Ohio in the Kniess Case as follows:

"After considerable uncertainty the courts finally held that the question of removal must be determined from the record at the time the petition for removal is filed. Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206, 50 L. Ed. 441, 26 St. Ct., 161; Southern Ry. Co. v. Miller, 217 U. S. 209, 54 L. Ed. 732, 30 S. Ct. 450. While this rule has been subject to severe criticism by both writers and judges (88 Central Law Journal, 246; Louisville & Nashville Rd. Co. v. Western Union Telegraph Co., 218 F., 81, 93; Hagerla v. Mississippi River Power Co., 202 F., 771, 773), it is settled today that the determination of the nature of the controversy must be decided solely upon the allegations contained in the petition. Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. Ed. 1122, 23 S. Ct., 807; Fraser v. Jennison, 106 U. S., 191, 27 L. Ed., 131, 1 S. Ct., 171; Moloney v. Cressler, 210 F., 104." (P. 436, 437) Kniess v. Armour & Co., 134 O. S. 432.

We state without fear of contradiction that there is not a single case or authority to the effect that the District Court has any power to consider the "facts" or, in fact, to [fol. 88] consider anything except the pleadings on file at the time the petition for removal was filed in determining whether or not a joint cause of action was stated. To repeat, there is no authority whatever for the position taken by the District Court in this cause.

From the foregoing cases and authorities it is obvious that the Federal Court, in considering whether or not the defendants had been properly joined or whether or not a joint cause of action was stated against them, could only pass upon the precise matter which had previously been determined by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio. The erroneous belief of the District Court that it had greater powers in passing upon the question does not alter the fact that it has in effect refused to give full faith and credit to the opinion, decision and judgment of the state courts. We submit that the purported action of the District Court is an attempted exercise of a jurisdiction that is not vested in said court by any law of the United States.

[fol. 89] 2. The Erroneous Orders of Remand entered by the District Court are not Reviewable by Appeal or Error, and a Writ of Mandamus is a Proper Method of Correcting the Error. (See paragraphs No. 25 to 30, inclusive, of petition for writ of mandamus.)

The removal statute, 28 U. S. C. A. 71 (Judicial Code Section 28 Amended) provides in part:

"* * * Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed. * * *"

28 U. S. C. A. Section 80 (Judicial Code Section 37) provides in part:

"If in any suit * * * removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said District Court shall proceed no further therein, but shall * * * remand it to the court from which it was removed. * * *"

It will be noted that there is no provision in Section 80 stating that an order of remand made under that Section "shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed." (Sec. 71)

[fol. 90] As a result, the Fourth Circuit Court of Appeals (Travelers Protective Association v. Smith (1934) 71 Fed. (2d) 511) and the Third Circuit Court of Appeals (Bank of Securities Corp. v. Insurance Equities Corp., (1936) 85 Fed. (2d) 856), have held that where the District Court has improperly made an order of remand under Section 80, a review is permissible in the Circuit Court of Appeals.

However, in a very recent case (Employers Corporation v. Bryant (decided January 4, 1937) 299 U. S. 374, the court

pointed out that Sections 71 and 80 are in pari materia, and should be construed together, and when so construed, prevents a review of all orders of remand by the District Court. The opinion by Judge VanDevanter in the Bryant case reviews the right to a writ of mandamus to review an erroneous order of remand under the various removal statutes in force from time to time, and succinctly states the law on the question as follows:

"1. For a long period an order of a federal court remanding a cause to the state court whence it had been removed could not be reexamined on writ of error or appeal, because not a final judgment or decree in the sense of the controlling statute. But in occasional instances such an order was reexamined in effect on petition for mandamus, and this on the theory that the order, if erroneous, amounted to a wrongful refusal to proceed with the cause and that in the absence of other adequate remedy mandamus was appropriate to compel the inferior court to exercise its authority.

"By the Act of March 3, 1875, c. 137, 18 Stat. 472, deal-[fol. 91] ing with the jurisdiction of the circuit (now district) courts, Congress provided, in § 5, that if a circuit court should be satisfied at any time during the pendency of a suit brought therein, or removed thereto from a state court, that 'such suit does not really or substantially involve a dispute or controversy properly within' its 'jurisdiction,' the court should proceed no further therein, but should 'dismiss the suit or remand it to the court from which it was removed, as justice may require.' Thus far this section did little more than to make mandatory a practice theretofore largely followed, but sometimes neglected, in the circuit courts. But the section also contained a concluding paragraph, wholly new, providing that the order 'dismissing or remanding the said cause to the state court' should be reviewable on writ of error or appeal. This provision for an appellate review continued in force until it was expressly repealed by the Act of March 3, 1887, c. 373, § 6, 24 Stat. 552, which also provided that an order remanding a cause to a state court should be 'immediately carried into execution' and 'no appeal or writ of error' from the order should be allowed.

"The question soon arose whether the provisions just noticed in the Act of March 3, 1887, should be taken broadly

as excluding remanding orders from all appellate review, regardless of how invoked, or only as forbidding their review on writ of error or appeal. The question was considered and answered by this Court in several cases, the uniform ruling being that the provisions should be construed and applied broadly as prohibiting appellate reexamination of such an order, where made by a circuit (now district) court, regardless of the mode in which the reexamination is sought. A leading case on the subject is In re Pennsylvania Co., 137 U. S. 451, which dealt with a petition for mandamus requiring the judges of a circuit court to reinstate, try and adjudicate a suit which they, in the circuit court, had remanded to the state court whence it had been removed. After referring to the earlier statutes and practice and coming to the Act of March 3, 1887, this Court [fol. 92] said (p. 454):

" 'In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.'

"The provisions in the Act of 1887 on which that decision and others to the same effect were based are still in force as parts of §§ 71 and 80, Title 28, U. S. Code. They are in pari materia, are to be construed accordingly rather

than as distinct enactments, and, when so construed, show, as was held in Morey v. Lockhart, 123 U. S. 56, 58, that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter." (P. P. 378, 379, 380, 381.)

[fol. 93] As pointed out in the foregoing opinion, it is well settled—

(a) An order of remand is not reviewable by appeal or error.

(b) That the usual order of remand following an original determination of the question by the Federal Court is not reviewable by way of a writ of mandamus.

It is the contention of Armour & Company in the instant case that the action of the District Court goes beyond the usual order of remand, in that the District Court purported to make a determination of a matter that had already been submitted to and passed upon by the State courts, and that the order of the District Court in effect refused to give full faith and credit to the decisions and orders of the State courts. 28 U. S. S. C. Section 687 provides in part that—

"The records and judicial proceedings of the courts of any state * * * shall have such faith and credit given to them in every court of the United States as they have by law or usage from the courts of the state in which they are taken."

As pointed out in a prior part of this memorandum, a judgment in the courts of a state is conclusive in the Federal Courts between the parties, whether the question determined was one of Federal, general or local law, even though [fol. 94] the State courts may have decided a jurisdictional question erroneously? American Surety Company v. Baldwin, supra.

After an extended search, we have been unable to find any case precisely identical with our case, where the courts have either granted or refused a writ of mandamus to compel a District Court to set aside an order of remand, on the ground that the matter had been previously passed upon and decided by the State courts. This is not particularly surprising, as it would be extremely rare for the Federal courts to disregard a decision of the State courts

upon a question where the State law is admittedly conclusive.

However, we have found two cases where the Federal Courts have issued an order of mandamus to the District Courts where the order of remand in the lower courts involved something more than a mere remand of the case.

The leading case on that question is In re Metropolitan Trust Company (1910) 218 U. S. 312. In this case it appeared that a suit had been brought against the Trust Company and others in the State Courts of New York, which suit was thereafter removed to the Federal Court on the ground that there was a separable controversy. The complainant moved to remand the cause, which motion was [fol. 95] denied. After the removal the Trust Company demurred. The United States District Court sustained the demurrer and dismissed the complaint as to the Trust Company. The other defendants then answered, and after a final decree in the defendant's favor was entered, the complainant appealed to the Circuit Court of Appeals, but did not seek a review of the decree dismissing the Trust Company.

The Circuit Court of Appeals decided that there was not a separable controversy and that the motion to remand should have been granted. After the order of remand was entered in the Circuit Court, the complainant moved to vacate the decree and remand the cause as to the Trust Company, which motion the court granted. The Trust Company then applied to the Supreme Court for a writ of prohibition and mandamus. In granting the writ of mandamus, the Supreme Court, in an opinion by Justice Hughes, said:

"* * * After the term had expired, and after the complainant had exercised his right of appeal to procure a review of the errors of which he desired to complain, it was sought to set aside a decree which stood unreversed and by which the Trust Company had been dismissed from the cause.

"To reach this result the Circuit Court asserted the power to vacate the decree upon the ground that it had been rendered without jurisdiction; and the court held that it must be treated as a nullity. But the decree cannot be so regarded unless the court, upon the motion to remand, was without jurisdiction to determine whether a separable con-

[fol. 96] troversy existed, and hence not merely committed error but exceeded its authority. The decree was not a nullity unless the order refusing to remand was a nullity; and the latter contention was negatived by the decision of this court upon the application for a writ of mandamus in In re Pollitz, supra. The reversal by the Circuit Court of Appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the court of first instance any the less 'a judicial act, and within the scope of its jurisdiction and discretion;' and as that reversal and direction did not affect the Trust Company the decree in its favor remained in full force" (pp. 320, 321).

The foregoing case was recently followed in an identical case by the 4th Circuit Court of Appeals, in *Windholz* v. *Everitt* (C. C. A. 4, 1935) 74 Fed. 2d 834.

A case that distinctly states the rule for which we are contending is Wiley vs. Judge of Allegan Court, 29 Mich. 488, at page 495 where the court says:

"• • • The true principle upon which a majority of the cases may be reconciled is that if the inferior court has acted judicially in the determination of a question of fact, or a question of law (at least if the latter be one properly arising upon the case itself, and not some collateral motion or matter—that is, if the case or proceeding before it, upon the facts raised the particular question in such shape as to give the power judicially thus to determine it) then such determination however erroneous cannot be reviewed. • • • But if the case before the lower court does not, upon its facts or the evidence, legitimately raise the question of law or fact it has assumed to decide, so that the court could act judicially upon it, or so as to give the court the power judicially to make the decision it has assumed to make, then [fol. 97] its action is not properly judicial and no assumed determination of it, nor any order resting upon it, will preclude the remedy by mandamus. • • •".

The foregoing decision is peculiarly appropriate to our case. We contend, as is so clearly pointed out in that case, that the District Court improperly assumed to decide a question that was not, on the record before the District Court, presented to it for determination. In other words, we do not seek a review of the correctness or incorrectness

of the court's decision but claim that the question was not open for decision as it had previously been litigated by the adverse parties and decided by the Supreme Court of Ohio.

In addition to the fact that this question was not before the District Court for the reason that it had been previously decided by the Supreme Court of Ohio and involved a decision on which the Ohio law was controlling, the question was not before the District Court for the further reason that Kniess, et al. had filed amended complaints in the District Court and entered into stipulations (see paragraphs Nos. 13 and 14 of petition for writ of mandamus), thereby waiving any formal defects in the petition for removal. The Supreme Court of the United States has held that such action waives any formal defects. The case we refer to is In re Moore, 209 U. S. 490, the first headnote in this case being as follows:

[fol. 98] "In either case, the filing by the defendant of a petition for removal, the filing by the plaintiff after removal of an amended complaint or the giving of a stipulation for continuance, amounts to the acceptance of the jurisdiction of the Circuit Court."

As we have pointed out, the question was not presented for determination to the District Court for two reasons. First, the question had previously been determined by the Supreme Court of Ohio, and second, the proceedings taken by Kniess, et al. in filing amended complaints and entering stipulations in the District Court waived any formal defects in the petitions for removal.

In the cases brought by Kniess, et al. against petitioner and Burmeister, the Court of Common Pleas of Lucas County, Ohio is faced with the mandate of the Supreme Court of Ohio ordering these causes removed, and with a conflicting mandate from the District Court purporting to make a second determination and a contradictory order on the same question.

[fol. 99] This situation certainly does not accomplish the objects of the removal statutes "to suppress further prolongation of the controversy". Surely it was never intended that a question should be litigated through the courts of Ohio and finally determined by the Supreme Court of Ohio and that that identical question could then be considered de novo by the District Court and decided by the District Court contrary to the decision of the Supreme Court of

Ohio, particularly when it is admitted that the question involved is determined exclusively by the law of Ohio, as construed by the courts of Ohio.

Conclusion

We do not believe there can be any question whatever but that the District Court erred in remanding the causes referred to, and that the order of the District Court has in effect refused to give full faith and credit to the judgment of the courts of Ohio on a question that is determined exclusively by the law of Ohio.

The question of whether or not the petitioner is wholly without any remedy is concededly debatable, for, as we have stated, we know of no case where the question has arisen or been discussed. By analogy to the cases referred to where an order of remand involved, as it does in our case, something more than a mere original determination of [fol. 100] the question, it would appear that mandamus was the proper remedy. This is particularly true in a case like ours where the court purported to determine a matter that was not presented on the record before the court.

This memorandum is filed pursuant to Rule 33 of the Rules of this court to show "that the application justifies a hearing". We submit that it is apparent "that the application justifies a hearing", and that leave to file should be granted and an order to show cause entered, so that the matter may be fully presented to and considered by the court.

Respectfully submitted, Welles, Kelsey, Cobourn & Harrington, Edward W. Kelsey, Jr., Fred A. Smith, Attorneys for Petitioner.

[fol. 101] In United States Circuit Court of Appeals, Sixth Circuit

Order Granting Leave to File Petition for Writ of Mandamus, etc.—October 12, 1939

The motion for leave to file a petition for a Writ of Mandamus is allowed, and upon the presentation of the petition for such Writ to be directed to the Honorable Frank L. Kloeb, Judge of the United States District Court for the

Northern District of Ohio, Western Division, to show cause why a Writ of Mandamus should not issue, commanding Judge Kloeb to grant petitioner's motion to set aside and vacate the Order of Remand in the case of George E. Kniess v. Petitioner, et al., being No. 4338, Civil on the docket of said court, and four related cases, carrying docket numbers 4339, 4340, 4341, 4342, as appearing in Exhibit L to the petition, and to grant petitioner's motion to amend the petition for removal in the first mentioned case,

It is Hereby Ordered that a copy of the petition, exhibits and a copy of this order be forwarded by the Clerk of this court to the Honorable Frank L. Kloeb, District Judge, in lieu of issuing a rule to show cause, with the request that His Honor, Frank L. Kloeb, reply thereto within twenty (20) days from this date.

[fol. 102] IN UNITE STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

REPLY OF HONORABLE FRANK L. KLOEB, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION—Filed October 27, 1939

Comes now Frank L. Kloeb, as Judge of the District Court of the United States for the Northern District of Ohio, Western Division, to whom has been delivered a copy of the order entered October 12, 1939, by this Honorable Court, which order requests a reply, on or before the 1st day of November, 1939, to the petition of Armour and Company for a writ of mandamus commanding him as such Judge to grant petitioner's motion to set aside and vacate the order of remand in the case of George E. Kniess vs. Petitioner, et al., being number 4338, Civil, on the docket of said Court, and four related cases, carrying docket numbers 4339, 4340, 4341 and 4342, and to grant petitioner's motion to amend the petition for removal in said first mentioned case; and makes this his reply as follows:

1. Respondent respectfully says that this Court is without jurisdiction to issue said writ of mandamus, for that said order of remand by this respondent in said causes is a final order from which no appeal may be allowed, pursuant to the provisions of Title 28, Section 71, United States

Code, and said attempted review by mandamus of an order of remand has been expressly forbidden by the Supreme Court of the United States in Employers Reinsurance Corporation vs. Bryant, Judge, 299 U. S. 374.

[fol. 103] 2. This Court is further without jurisdiction to entertain this suit or issue said writ of mandamus, because its power to issue said writ is limited, by the provisions of Title 28, Section 377, United States Code, to cases in which it has appellate jurisdiction and in aid of such jurisdiction, and this Court has no appellate jurisdiction to review or reverse respondent's orders of remand in said cases because of the express denial of such appellate jurisdiction in Title 28, Section 71, of the United States Code, hereinbefore referred to.

3. Respondent further respectfully points out that, as stated by the Supreme Court of the United States in the case of United States on the relation of Alaska Smokeless Coal Co. vs. Lane, Secretary of the Interior, 250 U. S. 549, on page 555, the writ of mandamus will not issue to control or direct the exercise of discretionary powers such as are involved in the decision by respondent of the several motions to remand these cases against petitioner to the state court.

4. Your respondent respectfully points out that on December 13, 1938, this Court adopted Rule No. 36, reading as follows:

"(a) The Rules of this Court promulgated March 15, 1913, with its amendments are hereby amended so as to harmonize with the 'Rules of Civil Procedure,' adopted by the Supreme Court of the United States pursuant to the Act of Congress of June 19, 1934 (c. 651).

"(b) Any rule of this Court which conflicts with the 'Rules of Civil Procedure' is deemed to be modified or superseded by said 'Rules of Civil Procedure' and the applicable portions of said 'Rules of Civil Procedure' govern."

[fol. 104] Rule 81 (b) of said Rules of Civil Procedure, so adopted by the Supreme Court of the United States, reads as follows:

"The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

Wherefore, respondent respectfully suggests that this Court, by reason of its own rule, No. 36 aforesaid, will no longer entertain or consider any petition for a writ of mandamus.

5. In the case of George E. Kniess vs. Petitioner, et al., No. 4338, civil, on the docket of the District Court of the United States for the Northern District of Ohio, Western Division, the motion to remand said cause was supported by an affidavit, the truth of which is not denied, showing the said George E. Kniess at the time of filing said suit in the Court of Common Pleas of Lucas County, Ohio, against Armour & Company, a citizen of the State of Kentucky, and Charles J. Burmeister, a citizen of Ohio, was not, and is not now, a citizen of any state or of the United States, but was and is an alien, and therefore no controversy existed or exists in said cause which is wholly between citizens of different states, as required by Title 28, Section 71, of the United States Code. Said affidavit is set forth as Exhibit J-1, appended to the petition of Armour & Company for this writ of mandamus, and is found on pages 42 to 44, inclusive, of said pleading.

6. The motions to remand filed in each and all of said five causes were supported by affidavits, the truth of which has not been denied, that petitioner, Armour & Company, at the [fol. 105] time it sold the pork product known as Boston butts to defendant, Charles J. Burmeister, knew that said Burmeister intended to and would make the kind of sausage known as metwurst from said meat, from the eating of which metwurst made from diseased pork products so sold by Armour & Company, each of said plaintiffs contracted the disease known as trichinosis; that said Armour & Company solicited said order for metwurst from said Burmeister for that express purpose. Copies of said affidavits filed in the cases of George E. Kniess and Marie Kniess are appended to this petition as Exhibits J-2, page 45, and K-1, page 51, respectively. A like affidavit was filed in each of the other three causes referred to in said petition, as stated on page 9, paragraph 16, of said petition.

The facts stated in said affidavits were not pleaded in said five respective petitions, and said affidavits further declared that said facts were not known to said plaintiffs at the time said petitions were filed, but were first learned on the second

trial of the case of George E. Kniess, No. 4338, through cross-examination of the defendant, Charles J. Burmeister.

The Supreme Court of Ohio, in deciding the case of Kniess vs. Armour & Company, 134 O. S. 432, referred to in the instant petition, expressly stated that the question before it was whether the trial court erred in refusing to remove the cause to the District Court of the United States, and that "this question is to be adjudicated solely upon an examination of the allegations contained in the petition of the plaintiff." (Page 437.)

[fol. 106] That Court further stated that it could not give any consideration, upon this question or removal, to the evidence adduced on the trial, which was the subject of the affidavits above referred to. (Opinion, page 440.)

Your respondent, pursuant to the direction and requirement of Title 28, Section 80, United States Code, and of the order and rule laid down by the Supreme Court of the United States in McNutt vs. General Motors Acceptance Corporation of Indiana, Inc., 298 U. S. 178, that the United States District Court is not bound by the pleadings of the parties, but may of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts to ascertain if a separable controversy actually exists, considered the facts shown in said affidavits, in conjunction with the petitions in said causes, and it appeared to the satisfaction of this Court that none of said suits really and substantially involved a dispute or separable controversy wholly between citizens of different states which could be fully determined as between them, and therefore none of said causes were within the jurisdiction of the District Court of the United States, and further that plaintiff Kniess is an alien, whereupon, your respondent made and caused to be entered an order of remand to the Court of Common Pleas of Lucas County, Ohio, in each of said causes, upon the aforesaid grounds not considered or determined by the Supreme Court of Ohio or said Court of Common Pleas, as well as other grounds hereinafter referred to.

[fol. 107] 7. The several petitions for removal of said five causes, filed by petitioner in the Court of Common Please of Lucas County, Ohio, were defective in that they did not allege that the ground for removal was because of the existence of a separable controversy between the respective plaintiffs and Armour & Company, but left it to be inferred

that the ground for removal was diversity of citizenship, which was the only fact pleaded.

8. Answering the statement on page 12 of said petition, paragraph 27, your respondent respectfully states as to the claim of petitioner that the various plaintiffs in each of said causes were estopped to question the jurisdiction of the United States District Court, and consented to the removal proceedings, that such alleged estoppel did not and does not bind the District Court of the United States, nor your respondent as a judge thereof, nor prohibit your respondent, as such judge, from inquiring into the facts of each of said cases to ascertain if a separable controversy actually existed, as required by Title 28, Section 80, United States Code. Nor may jurisdiction of a cause in the United States Court be conferred by consent of the parties.

9. By the order of remand to the state court of each of said five cases, your respondent, as judge, and the District Court of the United States, ceased to have any jurisdiction to consider or determine the several motions of petitioner to vacate and set aside said orders of remand, or to consider the motion of petitioner for leave to amend its petition for removal in the George E. Kniess cause, according to the rule stated in Ausbrooks vs. W. U. Telegraph Co., 282 [fols. 108-109] Fed. 733.

Wherefore, respondent prays that this Court order this cause heard as upon motion, pursuant to Rule 33 of this Court, and that upon such hearing the petition for mandamus be dismissed at petitioner's costs.

[fol. 110] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8355

ARMOUR AND COMPANY, Petitioner,

v.

THE HONORABLE FRANK L. KLOEB, District Judge, Respondent

Petition for Writ of Mandamus

OPINION—Filed December 5, 1939

Before Hicks, Simons and Allen, Circuit Judges

SIMONS, Circuit Judge.

The petitioner applied for a writ of mandamus to compel the respondent to set aside his order remanding the cause to the State Court and directing him to take jurisdiction of it. We issued an order to show cause to which appropriate reply has been made supported by brief.

The first contention that confronts us is that we have no power to issue the writ because, by Section 81(b) of the Federal Rules of Civil Procedure, writs of scire facias and mandamus were abolished. The short answer to this is that the Act of Congress, Title 28, U. S. C. A. Section 723b, empowering the Supreme Court to promulgate rules of civil procedure, provides that it "shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practices and procedure in civil actions at law." While Section 81(b) is general in its terms, it cannot be construed to apply to Circuit Courts of Appeals, since so construed it would be in the exercise of a power not conferred upon the Supreme Court, nor can the rules so circumscribed by the enabling act be construed as to repeal Title 28, U. S. C. A. Section 377, which confers upon Cir- [fol. 111] cuit Courts of Appeals the power "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

But even were we to construe Section 81(b) as forbidding the issue of writs of mandamus by this court, the contention would be of little moment since the rule also provides that "relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules." There would seem to be little difficulty, if required, in interpreting the petitioner's application as an appropriate motion upon which to base relief, if to such relief the petitioner is entitled, notwithstanding the designation it has given to it, and notwithstanding that, under the asserted interpretation, we might be foreclosed to issue the more formal and conventional writ of mandamus.

This brings us to a consideration of the meritorious issue raised by the petition and the response.

A number of persons, including George E. Kniess, brought suit against Armour and Company in the Court of Common Pleas of Lucas County for damages claimed to have been suffered in the consumption of food products, materials for which were prepared by Armour and Company, but which were processed by a retailer in Toledo by the name of Burmeister. In each of the five cases, and upon identical petitions, the plaintiffs joined Burmeister as a defendant on the theory that he and the Armour Company were joint tortfeasors. Armour and Company filed its petitions for removal with the Court of Common Pleas accompanied by proper removal bonds. Its petitions were contested by the plaintiffs and were denied. The Kniess case proceeded to trial while the other cases were held in abeyance and it eventually reached the Supreme Court of Ohio, 134 O. S. 432. That court disposed of the case upon the sole ground that the removal petition should have been allowed, because a separable controversy existed as between plaintiff and Armour. It stated the law of Ohio to be that where the responsibility of two tortfeasors differs in degree and in nature, liability cannot be joint and the alleged torts are not concurrent. Holding that the defendant Armour and Company had adequately preserved its exceptions to the ruling of the lower court, the cause was reversed and remanded to the Court of Common Pleas with instructions to grant the removal petition, and the mandate directed the Court of Common Pleas to remove the cause to the District Court of the United States.

[fol. 112] When the case came before the respondent the plaintiff moved to remand and, notwithstanding the adjudication by the Ohio Supreme Court which had become final, the respondent proceeded to take evidence upon the question of a separable controversy, decided there was none, that the cause was not removable under the statute, entered an order to remand the case to the Court of Common Pleas of Lucas County, and denied petitions for rehearing.

It is conceded that as the law now stands no appeal can be taken from an order of remand. The applicable statute is that of March 3, 1887, particularly sections 71 and 80, Title 28, U. S. Code. While this statute does not in terms prohibit the use of a writ of mandamus to review an erroneous order of remand, the Supreme Court, in Employers Reinsurance Corporation v. Bryant, District Judge, 299 U. S. 374, approving the reasoning in In Re Pennsylvania Company, 137 U. S. 451, holds that the two sections must be read in pari materia and, so read, the statute is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process, and the Act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.

Our precise question is then whether this statute, as so interpreted, reaches a case where the District Judge undertook an inquiry into the separable nature of the controversy notwithstanding this issue had been finally adjudicated at the instance of the party seeking the remand by the court of last resort in Ohio and this requires consideration of the precise terms of the removal statute, 28 U. S. C. A., Sections 71 and 80.

Section 71 provides:

"Whenever any cause shall be removed from any State Court into any District Court of the United States and the District Court shall decide that the cause was improperly removed and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed."

Section 80 which the Supreme Court held must be read in pari materia with Section 71, provides in part:

"If in any suit • • • removed from a State Court to a District Court of the United States it shall appear to the

satisfaction of the District Court at any time after such suit has been * * * removed thereto that such suit does not [fol. 113] really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court * * * the said District Court shall proceed no further therein but shall * * * remand it to the court from which it was removed."

It would seem that in the use in Section 71 of the words "the District Court shall decide," and in the employment in Section 80 of the phrase "it shall appear to the satisfaction of the said District Court," it was within the contemplation of the Congress that the statue should apply to those cases in which there was some issue which, as a matter of primary decision, was submitted to the District Judge. It certainly could not have been intended to apply to decision of a question which was not properly at issue before the District Judge since it had already been adjudicated by the Supreme Court of Ohio in the same proceeding, between the same parties, and upon the plaintiff's petition. To hold otherwise would be to permit the District Court to defy the statute 28 U. S. C. A., Section 687, which provides:

"The records and judicial proceedings of the courts of any state * * * shall have such faith and credit given to them in every court of the United States as they have by law or usage from the courts of the state in which they are taken."

It has been said in reference to the general supervisory power of the Supreme Court over inferior jurisdictions, that it is "of great moment in a public point of view, and should not, upon light grounds, be taken away in any case." In Re Pennsylvania Company, supra. What was there said of the supervisory power of the Supreme Court over this and the District Courts, must apply equally to the supervisory power of this court over jurisdictions inferior to it. The decisions in Employers Reinsurance Corporation v. Bryant, District Judge, supra, and in In Re Pennsylvania Company, supra, must not, in our judgment, be extended beyond the situations requiring the application of the rule there announced, that is to say, to cases where the issue of the petition to remand called for original and primary decision by the District Court unfettered by the doctrine of

res judicata or the mandate of the "full faith and credit" statute.

That the decision of the Ohio Court was res judicata notwithstanding the issue was one involving the jurisdiction of a federal Court, is settled by American Surety Co. v. Baldwin, 287 U. S. 156; Baldwin v. Iowa State Traveling Men's [fol. 114] Assn., 283 U. S. 522, and the decision in Evelyn Treinies, Petitioner, v. Sunshine Mining Co., et al., — U. S. —, announced as recently as November 6, 1939.

While the precise question here involved is one of first impression, the Supreme Court in In Re Metropolitan Trust Company, 218 U. S. 312, has drawn the distinction between orders to remand erroneously issued and those issued by a District Judge in excess of his authority. The former may not be challenged by appeal or writ of mandamus—the latter are a nullity. We think it follows that under general supervisory powers they may be set aside.

Another consideration points to decision. It is somewhat difficult to understand why the plaintiff in the action should seek to remand the case to a State Court already foreclosed from its consideration by the mandate of the Supreme Court of Ohio to which it must bow. Perhaps there is expectation that the pleadings may be amended and so a new issue permitted to be framed that would permit a second appeal, notwithstanding the rule that removability of a case is to be determined by the original pleadings, and notwithstanding the rule of the law of the case. However that may be, the objective of the statute prohibiting review of orders of remand is "to suppress further prolongation of the controversy by whatever process," and the sensing of this objective led to the interpretation announced in In Re Pennsylvania Company, supra. While the federal Courts have been ever solicitous of the limitations upon their own jurisdiction, and ever mindful of the desirability of avoiding unseemly conflicts between the courts of the two sovereignties, they should now accept with grace jurisdiction relinquished by the Ohio Court and end the shuttling of the controversy between the two jurisdictions.

The petitioner is entitled to the writ as prayed. We assume in view of the conclusions expressed herein that its issue will not be required, if the District Judge is not now foreclosed by the Rules of Civil Procedure to vacate the order of remand.*

[fol. 115] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

ORDER FOR MANDATE—March 12, 1940

Upon a petition for a writ of mandamus to compel the respondent to set aside an order remanding the cause to the State Court, and directing him to take jurisdiction of it, we announced an opinion in the above cause on December 5, 1939, in which we stated it to be our conclusion that the District Court had no power to determine the issue of separable controversy entitling the petitioner to remove because that issue had already been adjudicated by the Supreme Court of Ohio, and the District Court, upon familiar principles, was bound by such adjudication.

In conformity, however, with precedent, and as a gesture of courteous consideration to the District Judge, we did not direct the issue of the writ announcing our assumption that, in view of the conclusions expressed in our opinion, its issue would not be required. We — now advised by counsel for the petitioner that the District Judge has not set aside his order of remand, has not resumed jurisdiction of the cause in conformity with the views expressed in our opinion, and that the plaintiffs in the case have filed motions in the Court of Common Pleas of Lucas County, Ohio, from which they were removed, asking for an order putting the cases upon the assignment list for trial and fixing a date therefor.

In consideration of the above, it is now ordered that a mandate issue forthwith in conformity with the petition and [fol. 116] the conclusions expressed in our opinion commanding the respondent to set aside his order of remand in this cause or causes referred to in the petition, directing him to take jurisdiction thereof, and to set such early date for trial as may conform to his convenience and the business of the court.

[fol. 117] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 118] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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